



*Office of the  
Inspector General*

*A Report to the Kansas Health  
Policy Authority Board*

*June 2010*

*10PA01*

## ***A PERFORMANCE AUDIT OF KHPA'S MEDICAID CONTRACT AWARD PROCESS***

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***Does KHPA's Process for Awarding  
Contracts Comply with State  
Contracting Laws and Does KHPA  
Follow Industry Accepted Best  
Practices?***

## **OFFICE OF THE INSPECTOR GENERAL KANSAS HEALTH POLICY AUTHORITY**

The Kansas Health Policy Authority (KHPA) Office of Inspector General (OIG) was created by the 2007 Kansas Legislature as part of a much larger health reform bill, commonly referred to as Senate Bill 11. This creation of an independent oversight body, with the responsibility to review and investigate KHPA's performance in delivering health services, was a significant step in reforming public health care in Kansas.

The KHPA OIG, whose enabling statute is K.S.A. 75-7427, is the first statutorily created Office of Inspector General in Kansas. Its mission is:

- To provide increased accountability and integrity in KHPA programs and operations;
- To help improve KHPA programs and operations; and
- To identify and deter fraud, waste, abuse and illegal acts in the State Medicaid Program, the MediKan Program and the State Children's Health Insurance Program.

To fulfill its mission, the KHPA OIG conducts:

- Investigations of fraud, waste, abuse, and illegal acts by KHPA or its agents, employees, vendors, contractors, consumers, clients, health care providers or other providers.
- Audits of the KHPA, its employees, contractors, vendors and health care providers.
- Reviews, which may also be called inspections or evaluations.

The KHPA OIG conducts its audits in accordance with applicable government auditing standards set forth by the U.S. Government Accountability Office and its reviews and investigations in accordance with the Quality Standards for Investigations, Inspections, Evaluations, and Reviews of the Association of Inspectors General (AIG).

As required by K.S.A. 75-7427, the KHPA OIG will report findings of fraud, waste, abuse or illegal acts to KHPA and also refer those findings to the Attorney General.

The current Inspector General, Nicholas M. Kramer, was appointed by the KHPA Board in September 2009. His professional certifications include Certified Public Accountant, Certified Internal Auditor, and Certified Information Systems Auditor. Other members of the team are: Felany Opiso-Williams, Auditor; Stephen Mhere, Data Auditor and Kimberly Epps, Administrative Specialist.

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## Executive Summary

The mission of the Kansas Health Policy Authority is to “develop and maintain a coordinated health policy agenda that combines the effective purchasing and administration of health care with promotion oriented public health strategies (K.S.A. 75-7404).” As you can see, *effective purchasing* is a responsibility that lies at the core of KHPA’s statutory mandate.

With state government funding strained to unprecedented limits and health care issues at the forefront of the state and national dialogue, it is increasingly important that KHPA accomplishes its mission with limited resources. Because KHPA obtains much of its functionality through contracting rather than hiring state workers, its ability to establish effective contracting practices for vendor-supplied services is of utmost importance today.

Recognizing the importance of this topic, the KHPA Board of Directors approved an OIG audit of KHPA’s contracting practices. This audit addresses the following questions:

- **Does KHPA’s contracting process comply with state contracting laws?**
- **Does KHPA’s contracting process compare favorably with best practices or can improvements be achieved?**

To address our audit objectives, the OIG researched the law and interviewed purchasing officers from the Department of Administration and KHPA. We selected 10 different contracts active in FY 2010 for a detailed review, making sure that different types of contracting processes – interagency, competitive bid, and sole source – were all represented. In this way, we were able to document and test the procedures used for each contract award process.

As part of our audit analysis, the OIG documented, validated and reviewed KHPA’s contracting practices. Although KHPA has no official policy and procedural manual to guide its employees, the agency uses the guidelines and principles established for each stage of the contracting process by the Department of Administration’s Division of Purchases. In each award that we examined, the contract was independently reviewed and approved by the Director of Purchases. No contract above \$5,000 may be executed without receiving approval and signoff by the Director of Purchases.

KHPA’s competitively bid contracts comprise over 94% of total expenditures for contracts active in FY 2010. For these contracts, the competitive purchase negotiating process requires independent scrutiny by the Division of Purchases. It appears that controls exist to help ensure fairness in contract awards, securing a high quality of services at a fair price and protection against potential legal action by unsuccessful bidders.

For contracts with lower amounts, the rules are more relaxed. KHPA is not required to seek competitive bids for contracts \$5,000 or less. Even for contracts that total as much as \$1 million or more, statutory exceptions allow for sole sourcing if approved by the Director of Purchases. KHPA managers have made use of this flexibility to complete contracts with other agencies and vendors using sole source arrangements.

Based on our review of the contract awards in our sample and on our discussions with contracting officers, we concluded that KHPA's contracting process conforms to state law and Division of Purchases policies. KHPA's process for handling contracts that need not be competitively bid complied with the law and has received Division of Purchases approval.

As part of our audit analysis, the OIG compared KHPA's contracting practices with selected guidelines provided by the National Association of State Procurement Officials (NASPO) and the Federal Acquisition Regulations (FAR). NASPO's *State & Local Government Procurement, A Practical Guide* emphasizes the importance of seeking competition in government procurement. A competitive process aids the government purchaser in attaining the highest quality commodities and services at the lowest possible cost. The ultimate justification for the existence of all competition laws is to protect the government as consumer. Other benefits from the competitive marketplace include promoting better market performance and encouraging new technology and higher productivity. Experts say that the overall benefits of competitive bidding outweigh the administrative costs in the long run.

According to NASPO, promoting competition at each stage of the procurement process includes following best practices such as the following:

- Make the decision to initiate the competitive process whenever possible instead of relying on sole source procurement.
- Staff the process with truly independent procurement professionals.
- Complete market research to create and expand lists of possible vendors.
- Draft contract specifications independently of any prospective vendor.
- Publicly announce invitations for bid or requests for proposals using the form of publication likely to reach the broadest possible number of potential vendors.
- Publicly announce the award of contracts.
- Avoid conflicts of interest.
- Document each stage of the process in a single procurement file or series of files.

The arguments for using sole sourcing instead of competitive bidding include the additional time, effort, and costs associated with inviting, evaluating and negotiating with multiple bidders. In addition, there are instances where immediate priorities and practical considerations override the desire to seek competitive bids.

In this audit, we found that KHPA used competitive bidding for 15 of its 57 active contracts, representing about one-fourth of its contracts and over 94 percent of the amounts awarded. There are 25 interagency contracts, which are exempt from competitive bidding requirements. For the remaining 17 contracts, comprising less than three percent of amounts awarded, KHPA employed sole sourcing as its preferred method. According to KHPA management, there were valid, practical reasons why sole sourcing was chosen.

The OIG thoroughly reviewed each contract in our sample to ascertain completeness and adherence to laws, standards, and best practices, but we did not try to judge whether competitive bidding would have

been possible or preferable. We noted that KHPA's written justification on the prior authorization form was adequate to meet the Division of Purchases' standards, but insufficient to meet the guidelines established by the National Association of State Procurement Officers and the Federal Acquisition Regulations. These standards encourage organizations to adopt and follow competitive practices which can provide greater assurance against contracting risks. These processes are deemed important to maintaining the public image of the contracting agency and to reap the overall benefits of a more competitive purchasing environment.

Though amounts awarded using sole sourcing are miniscule in comparison to the large contracts awarded through competitive bidding, the OIG recommends that KHPA attempt to employ competitive processes more frequently. When competition is not possible or practical, KHPA should provide more detail in its documentation, explaining why competitive bidding was not possible. This will help assure stakeholders of KHPA's commitment and adherence to best practices and transparency in contract award processes.

Neither the Department of Administration nor KHPA has a documented process that provides step-by-step instructions for purchasing officers and managers. Instead, each relies on the experience and expertise of contracting officers who are well-versed in the contracting process and procurement law. The law is designed primarily to instruct purchasers as to when contracts must be awarded through a competitive bidding process and how to make the competition fair. The law also lists seven exceptions for types of procurements that need not be competitively bid. One exception allows agencies to not seek competitive bids when it is in the "best interest of the state."

We have included in this audit report nine recommendations, including the four listed below, which encourage KHPA management to consider adopting strategies and practices for all of its contracting:

- Require those involved in preparing, developing, or participating in the making or awarding of a contract to sign a conflict of interest statement in accordance with K.S.A. 46-233(a), K.S.A. 46-235, K.S.A. 46-286. This would assure the public and potential bidders that KHPA employees have no personal interest in the outcome of the award.
- Employ competitive bidding whenever possible, instead of using sole sourcing arrangements to acquire the services of current or former employees. It is legal and prudent to hire former employees who have the requisite skills to perform needed tasks. However, awarding contracts using sole source arrangements does not achieve the benefits of competition and could result in charges of favoritism from stakeholders, prospective bidders, and the general public.
- Conduct appropriate market research and prepare a statement of business need, to be approved by executive management, before beginning contract preparation.
- Consider preparing and adopting a KHPA policy and procedure manual to instruct those involved in the contracting process, to ensure conformity with applicable laws and regulations, to ensure consistency between contracts, and to mitigate the impact of turnover of knowledgeable, experienced contracting personnel.

We wish to thank Gary Combs and John Dixon as well as Christiane Swartz, Chris English, Darin Bodenhamer, Dr. Margaret Smith, and Dr. Barbara Langner for their kind assistance during the course of this audit.



## Audit Scope and Methodology

KHPA makes extensive use of outsourcing to manage its programs and deliver services. In FY 2010, KHPA has 57 active contracts, excluding consulting contracts with five health-related committees. Costs incurred in these contracts in FY 2010 totaled approximately \$259.5 million, excluding the managed care contracts which are based on capitation payments.<sup>1</sup> Because of the significant dollar amounts involved in some of these contracts, the KHPA Finance and Audit Committee expressed interest in the contract procurement audit included in the Office of Inspector General's FY 2009 Audit Plan at its October 2009 meeting.

This audit addresses the following objectives:

- (1) Determine whether KHPA's process for awarding contracts complies with state contracting laws.
- (2) Determine whether KHPA follows industry accepted best practices.

To complete this audit, OIG staff interviewed the Kansas Department of Administration (DoA) Director of Purchases to gain knowledge of State contracting laws, DoA Division of Purchases policies and procedures, and the role of the DoA Division of Purchases in overseeing and approving agency contracts. We also interviewed the KHPA Senior Manager of Contracts and Fiscal Operations, as well as the KHPA Manager of Contract Development, to understand KHPA contracting practices. Additionally, we interviewed three KHPA program managers regarding their role in contract development and award.

OIG staff also reviewed procurement or contracting best practices of the National Association of State Procurement Officers (NASPO), the National State Auditors' Association and other reputable organizations, as well as the Federal Acquisition Regulations. To verify KHPA's compliance with State contracting laws and adherence to recognized industry best practices, we reviewed a non-statistical sample of seven sole source and three competitively negotiated contracts,<sup>2</sup> all of which were active in FY 2010, except one professional services contract which ended in FY 2009. Our file review included contract documents, requests for proposals and addenda, contract coversheets (Form DA-146) and prior authorization forms. We requested the Centers for Medicare and Medicaid Services (CMS) Regional Office verify our sample of contracts for compliance with applicable federal laws.

This performance audit was conducted in accordance with applicable generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for findings and conclusions based on our audit objectives. We selected a sample of 10 contracts to gain a clear understanding of KHPA's contract processes. We did not make any determination related to contract pricing, nor did we audit the Department of Administration (DoA) Division of Purchases' procurement procedures. Had we reviewed more contracts or expanded our analysis beyond compliance with state contracting laws and industry best

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<sup>1</sup> Per member per month

<sup>2</sup> Two Medicaid contracts and one SCHIP managed care contract.

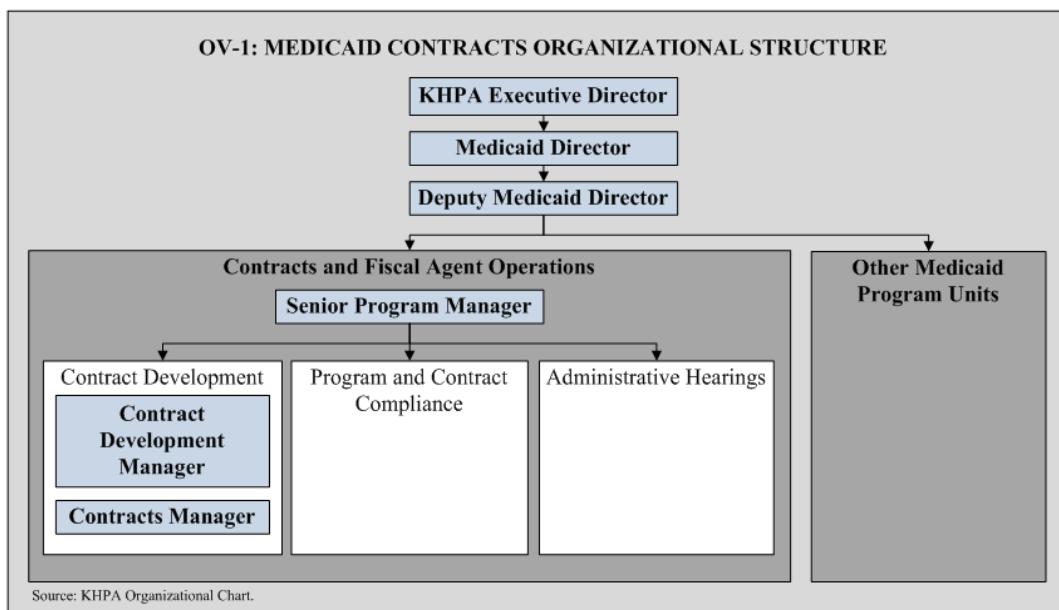
practices, other reportable matters might have come to our attention that may need corrective action. Such procedures would require more time than was intended for this audit.

## Overview of Contract Award Process

The Kansas Health Policy Authority (KHPA) is tasked by the Kansas Legislature through K.S.A. 75-7404 to develop and maintain a coordinated health policy agenda that combines effective purchasing and administration of health care. To that effect, KHPA purchases healthcare goods and services from vendors in and outside the State for the benefit of the citizens of Kansas. Some of the goods and services are procured via the contracting process. KHPA's contracts fall into three major categories:

- Managed care contracts with managed care organizations paid through per member per month capitation payments.
- Technical services contracts, which include the Medicaid Management Information System (MMIS) fiscal agent operations and the eligibility clearinghouse operations.
- Medical support service contracts, which include interagency agreements, agreements with counties providing certified match funds for prevention and early intervention health related services, federal grant contracts for special initiatives, and consultant and board member contracts for technical assistance and consultation services.

KHPA's Medicaid Contract Unit is responsible for writing and managing Medicaid contracts. As shown in OV-1, the unit has three individuals responsible for contract development: the contracts and fiscal agent operations senior manager and two contract development managers.<sup>3</sup> The program managers of each major program area in Medicaid are responsible for the success of their respective programs, and are also ultimately responsible for ensuring that contracts under their programs meet performance expectations and any problems associated with those contracts are identified and resolved.

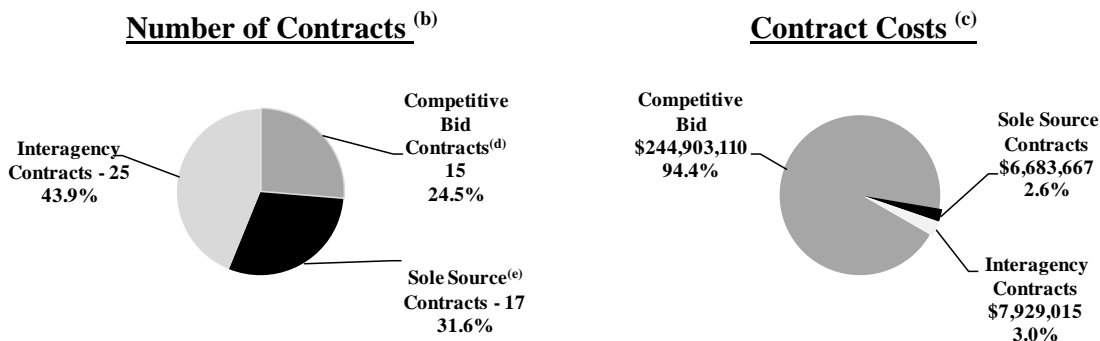


<sup>3</sup> KHPA has other contract and procurement officers under Finance and Operations and the State Employee Health Benefit Plan.

## KHPA Contracts at a Glance

Excluding committee contracts, KHPA has a total of 57 contracts active in fiscal year (FY) 2010. That number was divided into three different contract categories namely sole source, interagency, and competitively negotiated procurements. The pie charts below summarize, respectively, the number of contracts KHPA has and the total cost of contracts in each contract category.

### OV-2: TYPES OF CONTRACT AWARDS <sup>(a)</sup> OPEN FY 2010



<sup>(a)</sup> The numbers given indicate contracts that were current as of FY 2010 except for one contract which ended 6/30/09. It also includes one SCHIP funded managed care contract.

<sup>(b)</sup> Numbers include four managed care organization contracts (MCO's).

<sup>(c)</sup> Contract costs exclude the four MCO contracts. In FY 2009, KHPA paid \$383.65 million in capitation payments to these MCO's.

<sup>(d)</sup> Includes task orders for Document Imaging Management Services.

<sup>(e)</sup> Includes one contractor chosen by CMS.

Source: OIG analysis

The bulk of KHPA's current contracts are for vendor provision of services either directly to the agency or to Medicaid consumers. A few contracts are for delivery of goods, such as durable medical equipment and drugs. The purposes for which contracts were awarded include the following:

- **Interagency contractors** (county health departments, SRS/KDHE/KDOA, KU) provide prevention and early intervention services to adolescent and pregnant teen parents of at-risk infants, collaboration in running healthcare programs that benefit Kansas through SRS/KDHE, provision of Medicaid administrative hearing services, and provision of expertise in research and evaluation of various programs.
- **Competitive contractors** (fiscal agent, clearinghouse, MCOs, others) provide fiscal agent services including operation of payment system, eligibility determination and clearinghouse operations, capitated managed care health services and non-emergency medical transportation, and managed care services for HealthWave. Others provide services such as utilization reviews, building and implementing the Data Analytic Interface, and developing a methodology for setting rates for capitated payments.

- **Sole source contractors** (individuals, organizations) provide expert technical or consultative services in areas related to the MMIS and Medicaid Health Information Technology, advise on institutional reimbursements and the State Supplemental Payment Program, provide utilization reviews on hospital admissions and stays, examine medical records, prepare Federal grant applications, develop a claims payment system for the Demonstration to Maintain Independence and Employment (DMIE) program, provide a state and national media campaign to promote public/private partnerships for increased coordination between employment services and job seekers primarily for Medicaid beneficiaries.

Table OV-3 shows a summary of contracts that were either awarded or active in fiscal years 2007 through 2010. The contract amount in each category does not represent annual contract costs but total contract commitment costs for each contract awarded.

<b>OV-3: KHPA CONTRACT COUNT AND COSTS BY YEAR OF CONTRACT AWARD</b>											
<b>CONTRACT CATEGORY</b>	<b>FY 2007</b>		<b>FY 2008</b>		<b>FY 2009</b>		<b>FY 2010</b>		<b>TOTAL</b>		
	<b>#</b>	<b>AMOUNT</b>	<b>#</b>	<b>AMOUNT</b>	<b>#</b>	<b>AMOUNT</b>	<b>#</b>	<b>AMOUNT</b>	<b>#</b>	<b>AMOUNT</b>	<b>%</b>
<b>Competitive Bid<sup>(a)</sup></b>	5	\$164,780,972	1	\$5,074,792	6	\$73,583,100	3	\$1,464,246	15	\$244,903,110	94.4%
<b>Sole Source</b>	2	\$42,000	4	\$179,750	8	\$1,254,873	3	\$5,207,044	17	\$6,683,667	2.6%
<b>Interagency</b>	5	\$3,625,589	1	\$87,500	7	\$1,521,593	12	\$2,694,333	25	\$7,929,015	3.0%
<b>TOTALS</b>	12	\$168,448,561	6	\$5,342,042	21	\$76,359,566	18	\$9,365,623	57	\$259,515,792	100.0%
<sup>(a)</sup> Counts include the four managed care organization contracts, but amounts do not, as these contracts are paid on a per member per month basis. In FY 2009, KHPA paid \$383.65 million in capitation payments to these MCO's. Source: OIG analysis											

### ***Committee Contracts***

KHPA also entered into contracts with various healthcare professionals, who are hired to provide their expertise on five different committees. These committees are the Drug Utilization Review Board (DUR), the Medical Care Advisory Committee (MCAC), Mental Health Prescription Drug Advisory Committee (MHPDAC), the Peer Educational Review Council (PERC), and the Preferred Drug List Advisory Committee (PDL). Committee contractors<sup>4</sup> provide advice on drug utilization, medical necessity, design and implementation of the mental health prescription drug program, requests for prior authorization, and give expert advice on the clinical equivalency of agents in certain drug classes. Table OV-4 summarizes the committee contracts.

<sup>4</sup> Professionals in specific healthcare fields

<b>OV-4: COMMITTEE CONTRACTS</b>			
<b>COMMITTEES</b>	<b># OF MEMBERS</b>	<b>MAXIMUM ANNUAL AMT. ALLOWED <sup>(a)</sup></b>	<b>PAY PER HOUR PER MEETING <sup>(b)</sup></b>
Preferred Drug List Advisory Committee	8	\$39,992	\$100
Peer Educational Review Council	7	\$38,500	\$50-\$100
Drug Utilization Review Board	8	\$37,993	\$50-\$100
Medical Care Advisory Committee	10	\$37,990	\$50-\$100
Mental Health Prescription Drug Advisory Committee	15		Only travel reimbursement and meals
<sup>(a)</sup> Amounts paid for committee contracts are on a per hour per meeting basis. The actual amounts paid may be much lower than the amounts given.			
<sup>(b)</sup> Amounts in addition to travel reimbursement at the rate allowed for state employees.			
Source: Contract documents and OIG analysis.			

## Contract Process

In general, KHPA acquires goods and services through competitive and non-competitive contracts. KHPA management, with appropriate senior program managers' input, determines the agency's need for Medicaid-related services and decides whether to issue a contract through sole source or competitively negotiated procurement. Appropriate program staff draft the scope of work, terms and contract costs and submit these to the Contract Unit staff, who prepare the appropriate documents and ensure KHPA complies with form requirements and routes the necessary forms for approval to various KHPA and Department of Administration personnel. As with other state agencies, KHPA's procurement or contract award process is overseen by the DoA Division of Purchases.

The Division of Purchases' procurement officers facilitate the procurement process while relying on agency technical experts. To ensure only responsible bidders apply, the Division requires bidders to post a performance bond, which is viewed as the cost to transition to a new vendor. Procurement officers make sure the statutorily prescribed procurement requirements are followed. The Division has no formal state procurement manual. While the Division does not keep check sheets to ensure every step was followed, the contract is ultimately the "end all, be all" of the process. The Director of Purchases is statutorily mandated to make quarterly legislative reports on non-competitive and competitive contracts awarded.

### *Non-Competitive Contracts*

Non-competitive contracts go through the Director of Purchases' prior authorization process. Contracts that require prior authorization include emergency purchases necessary for the preservation of life or property or to avoid disruptions of KHPA operations; off-contract purchases for items identical to contract items offered at lower prices; sole source contracts for materials or professional services only one supplier is determined to have reasonably available; interagency purchases with other governmental entities; and, state use catalog waivers for materials or services the qualified vendor is unable to supply or is unable to meet delivery requirements.

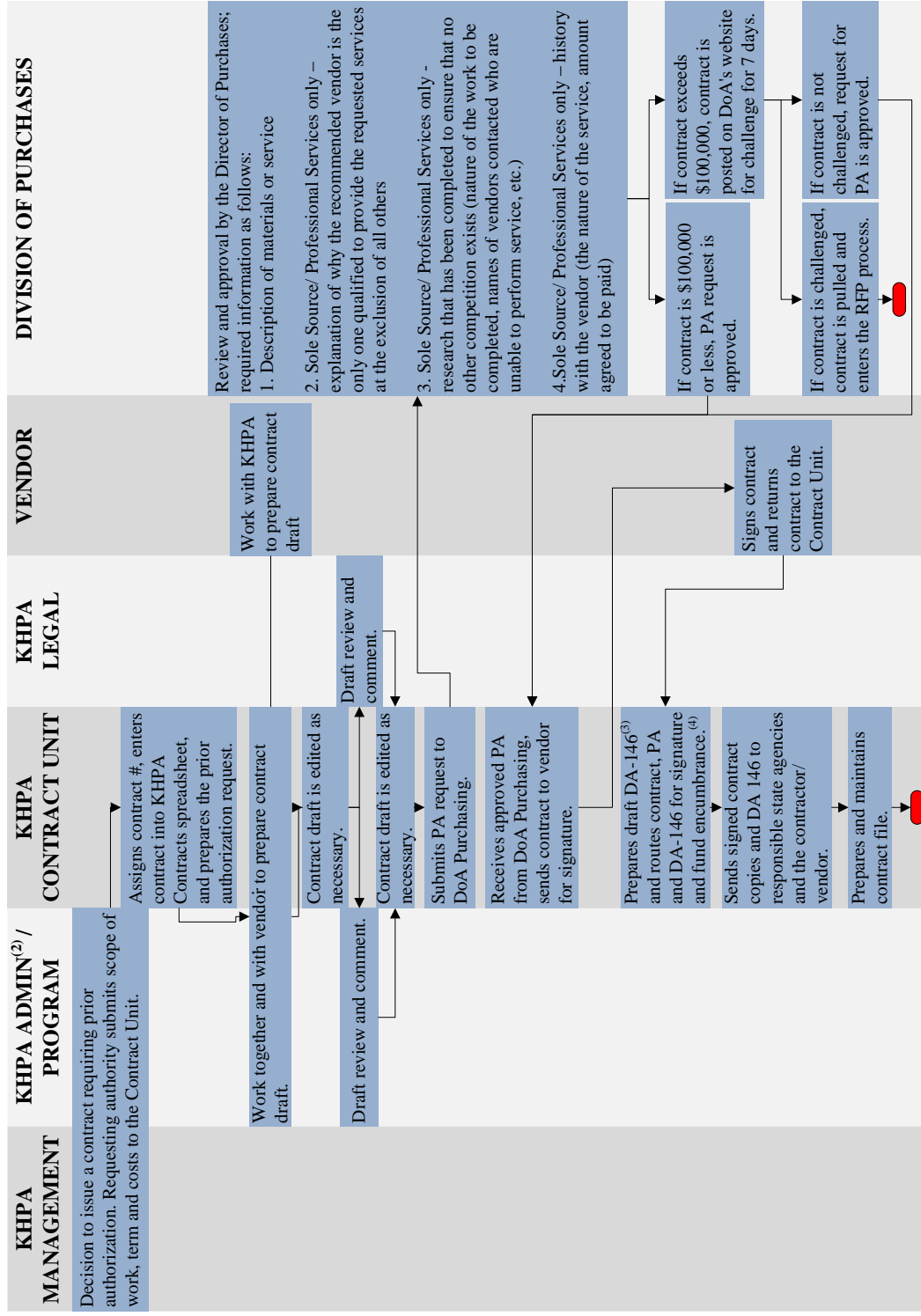
If KHPA chooses a non-competitive procurement, it must request approval from the Director of Purchases before contract implementation, unless the contract cost is \$5,000 or less. KHPA submits the required Division of Purchases prior authorization form and provides justification for why it decided against a competitively negotiated procurement. The information the Director of Purchases requests for sole source contracts includes the description of materials or service, an explanation why the recommended vendor is the only one qualified to provide the requested materials or services at the exclusion of all others, any research KHPA conducted to ensure no other competition exists, and its history with the vendor. If the contract is over \$100,000, the Division of Purchases will post the contract on the Division's website for seven days for other interested vendors to challenge. If no vendor challenges the sole source contract and the Director of Purchases or designated staff accepts KHPA's justification and approves the contract, KHPA proceeds with signing and executing the contract.

According to the Director of Purchases, the things they look for in a non-competitive prior authorization request include the following:

- KHPA attorney signature on the DA-146 or contract cover sheet indicating legal review
- Definite contract terms
- DA-146a or contractual provisions attachment
- Termination language or ability to get out of the contract
- Indications the contract constitutes an automatic renewal
- Indications the vendor wrote the contract (e.g. copyrights on documents submitted)

Chart OV-5, on the next page, shows a flowchart of the prior authorization process.

# OV-5: PRIOR AUTHORIZATION<sup>(1)</sup> FLOWCHART



(1) Prior authorized procurement include the following: DELEGATED AUTHORITY for goods/services not available on State contracts and costing less than \$2,000; EMERGENCY PURCHASE for those purchases necessary for preservation of life or property or to avoid serious disruption of agency operations; OFF-CONTRACT PURCHASE if a state agency locates a vendor that can provide the identical contract item at a lower price; SOLE SOURCE if after a search, only one supplier is determined to be reasonably available for the required product or service; INTERAGENCY PURCHASE by one governmental unit from another; PROFESSIONAL SERVICES as used in the Professional Services Sunshine Act (KSA 75-37, 130 et al); STATE USE CATALOG WAIVER when the "qualified vendor is unable to supply the products or services needed or is unable to meet delivery requirements on the order or requisition..."

(2) Comprises Medicaid Senior Managers and a Finance and Operations representative.

(3) DA-146 is the contract cover sheet.

(4) KHPA Finance for assignment of fund and PCA codes, allocation and encumbrance of funds and approval/signature on DA-146; KHPA Legal for final review and approval/ signature on DA-146; KHPA Program Administrator, Contracts Senior Manager and Director of Operations for review; KHPA Executive Director for signature; DoA Director of Purchases for signature on DA-146; DoA Accounts and Reports for state budget; KHPA contract unit. Source: Documents provided by KHPA Contract Unit staff.



## ***Competitive Contracts***

KHPA's larger contracts are likely to be competitively negotiated procurements which follow the Division of Purchases' Request for Proposal (RFP) process. According to the Director of Purchases, RFPs are for contracting for more complex services. RFPs do not require sealed bids and give the state and agency the ability to correct problems in the initial proposal.

RFPs are negotiated through the Procurement Negotiating Committee (PNC), and issued by the Division of Purchases. The PNC is composed of the Secretary of Administration's designee, the Director of Purchases or his designee, and a KHPA representative. KHPA may nominate a KHPA Contract Unit staff member as the Secretary of Administration's designee and usually designates a KHPA program manager or technical expert as KHPA's representative.

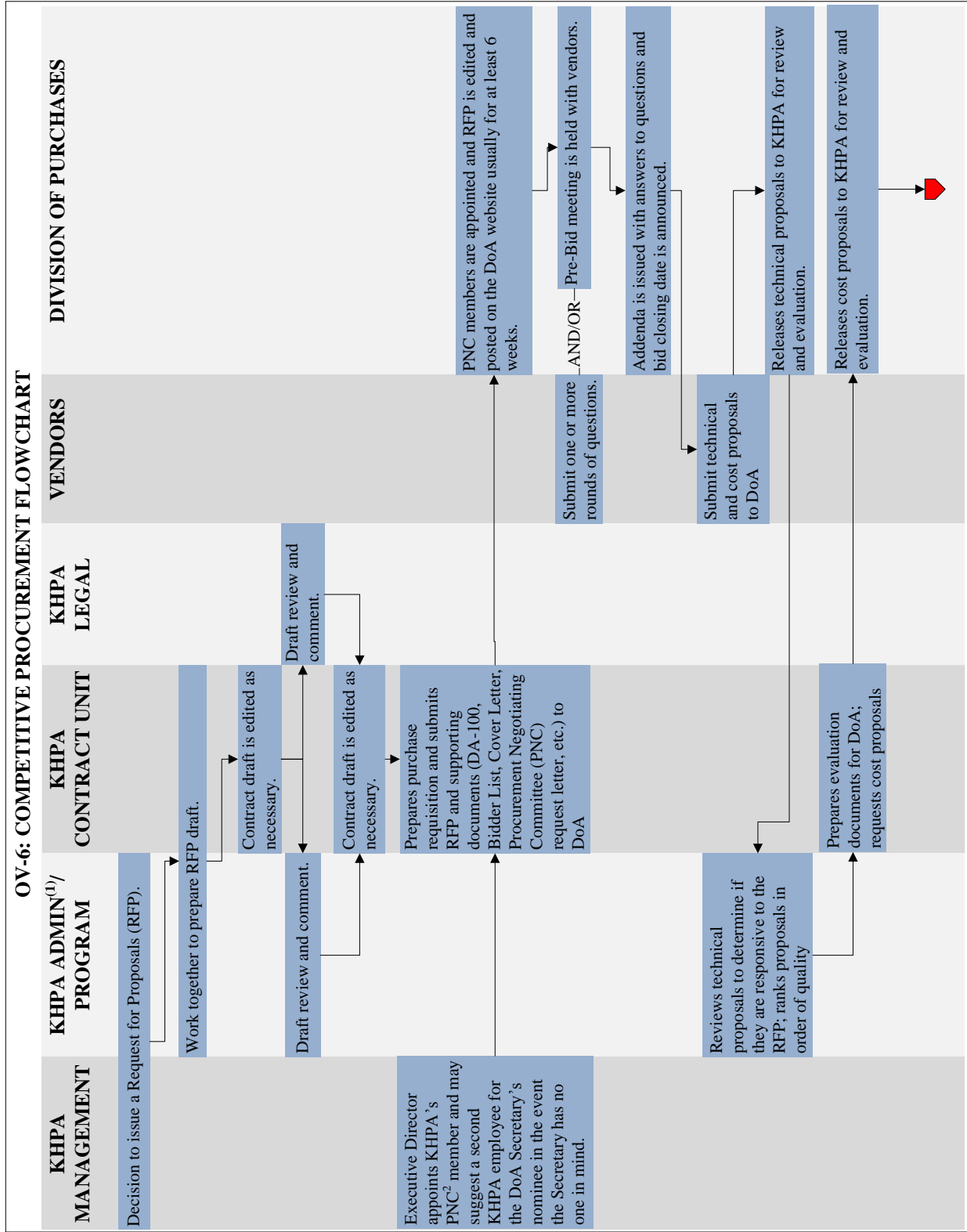
KHPA program managers and staff write the scope of work, deliverables, payment methodology and other contract terms or technical specifications deemed necessary. The KHPA Contract Unit ensures the RFP is in the appropriate format and includes any applicable federal requirements and terms required by the Director of Purchases. The Division of Purchases issues the RFP and oversees the receipt of proposals, evaluation, negotiation and award. The whole process may take 60 to 270 days or longer.

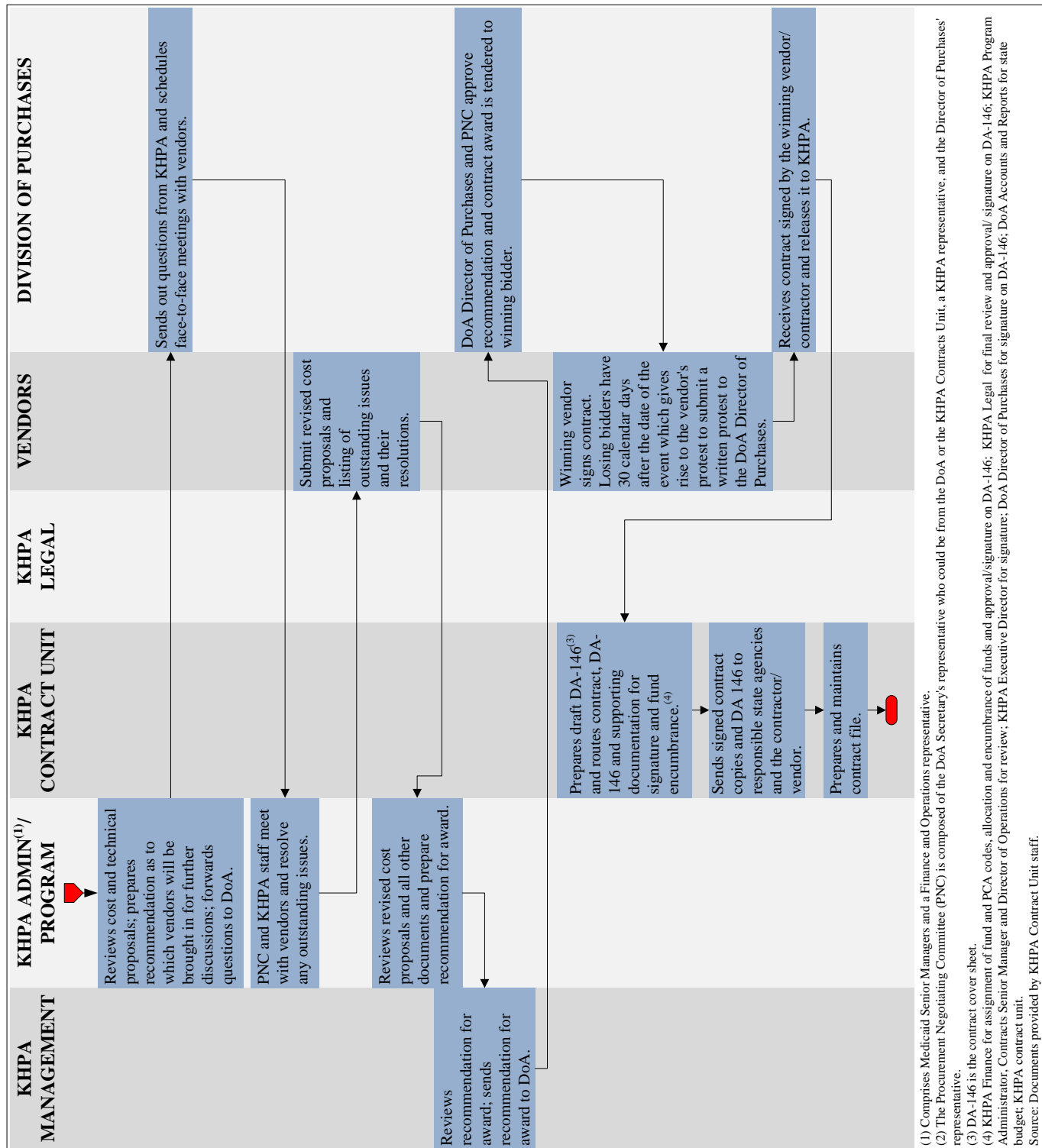
As shown in OV-6, selected KHPA staff evaluates the bidders' technical and cost proposals, rank the bidders and recommend a vendor to the Procurement Negotiating Committee and the Director of Purchases for approval. The Division of Purchases has no prescribed evaluation sheets but acknowledges the proposal with the best narrative improves the vendor's chances of being selected. The Purchasing Director has veto power to disapprove the PNC's recommendation.

## ***Amendments***

If subsequent to contract implementation KHPA discovers changes need to be made to the contract scope of work or any other terms of the contract, the amendment must be prior approved by the Director of Purchases if the original contract went through the prior approval process for non-competitive contracts. If the original contract went through the RFP process, the amendment must also be approved by the Procurement Negotiating Committee.

**OV-6: COMPETITIVE PROCUREMENT FLOWCHART**







## **Does KHPA's Process for Awarding Contracts Comply with State Contracting Laws?**

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### **State Procurement Laws**

State procurement laws are generally broad and primarily pertain to the powers and responsibilities of the DoA Director of Purchases, not the state agencies. These laws provide general guidelines for contract procurement; specify the reports the Director of Purchases must submit to the Legislative Coordinating Council, the Chairperson of the Senate Committee on Ways and Means, and the Chairperson of the House Committee on Appropriations, and set the required manner and timeframe for the Division of Purchases' publication or solicitation for bids prior to award. As shown in Table I-1 on the next page, state procurement laws outline general requirements related to the following procurement categories: competitive purchases greater than \$50,000; competitive purchases greater than \$25,000 but less than or equal to \$50,000; competitive purchases greater than \$5,000 but less than \$25,000; competitive purchases less than or equal to \$5,000; purchases greater than \$5,000 entered into without competitive bids; negotiated procurements; and, contracts for professional or consultant services.

The Director of Purchases is ultimately responsible for all state procurements, and his staff is responsible for reviewing documentation submitted by state agencies for purchasing contracts generally in excess of \$5,000 to ensure procurement laws and guidelines are followed. However, the Division of Purchases does not have a formal procurement policy and procedure manual. Instead, they emphasize flexibility and rely on the professional judgment of procurement staff.

With the approval of the DoA Secretary, the Director of Purchases may delegate authority to any state agency to make purchases of less than \$25,000 under certain prescribed conditions and procedures. The Director of Purchases may also authorize state agencies to contract for services and materials with other state agencies or with federal agencies, political subdivisions of Kansas, agencies of other states or subdivisions thereof, or private nonprofit educational institutions, without competitive bids. In addition, the Director of Purchases may delegate authority to any state agency to make purchases under certain prescribed conditions and procedures when the acquisition is funded, in whole or in part from a grant.<sup>5</sup> See Appendix C for a listing of state procurement laws.

KHPA is specifically allowed by K.S.A. 75-7403(b) to enter into contracts necessary to perform its powers, duties and functions and as provided by law. KHPA may enter into contracts with other state agencies or with local government entities for the coordination of health services, including care and prevention programs and activities, and public health programs.

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<sup>5</sup> Grant means a disbursement made from federal or private funds or a combination of these sources to a state agency.

I-1: STATUTORY REQUIREMENTS BY PROCUREMENT CATEGORY			
KANSAS STATUTE	PROCUREMENT CATEGORY	REQUIRED NOTICE	REQUIRED REPORT
<b>Competitive Procurements</b>			
75-3739(b)	<b>Purchases estimated to exceed \$50,000.</b>	<ul style="list-style-type: none"> <li>Sealed bids shall be solicited by notice published once in the <u>Kansas Register</u> not less than 10 days before the date stated in the notice for the opening of bids, unless the Director of Purchases determines that a more timely procurement is in the best interest of the state. All bids shall be sealed when received and shall be opened in public at the hour stated in the notice.</li> <li>The Director of Purchases may designate a <u>trade journal</u> for the publication, solicit bids by sending <u>notices by mail</u> to prospective bidders and by posting the notice on a <u>public bulletin board</u> for at least 10 business days before the date stated in the notice for the opening of bids, unless otherwise provided by law.</li> <li>Effective September 1999, public bulletin board means the the DoA Division of Purchases website (see Circular 595).</li> </ul>	The Director of Purchases shall prepare a detailed report at least once in each calendar quarter of <u>all instances in which the director waived publication of the notice of bid solicitations in the Kansas Register</u> and submit the report to the Legislative Coordinating Council, the chairperson of the Senate Committee on Ways and Means, and the chairperson of the House Committee on Appropriations.
75-3739(c)	<b>Purchases estimated to exceed approximately \$25,000 but not more than \$50,000.</b>	<ul style="list-style-type: none"> <li>Award shall be made after receipt of sealed bids, following at least 3 days' notice posted on a <u>public bulletin board</u>.</li> </ul>	
75-3739(d), (e)	<b>Purchases estimated to be more than \$5,000 but less than \$25,000.</b> With the approval of the DoA Secretary, the Director of Purchases may delegate authority to any state agency to make purchases of less than \$25,000 under certain prescribed conditions and procedures.	<ul style="list-style-type: none"> <li>Award may be made after the receipt of 3 or more bid solicitations by telephone, fax or sealed bid following at least 3 days' notice posted on a <u>public bulletin board</u>.</li> </ul>	The Director of Purchases shall prepare a report at least once in each calendar quarter of <u>all current and existing delegations of authority to state agencies</u> and submit the report to the Legislative Coordinating Council, the chairperson of the Senate Committee on Ways and Means, and the chairperson of the House Committee on Appropriations.
75-3739(d)	<b>Purchases estimated to be less than \$5,000.</b> These may be purchased under conditions and procedures prescribed by the Director of Purchases.	<ul style="list-style-type: none"> <li>No required notice.</li> </ul>	
75-37, 102	<b>Negotiated procurements.</b> Upon request by a state agency, and subject to the approval of the DoA Secretary, the Director of Purchases may convene a Procurement Negotiating Committee (PNC) to obtain services or technical products for the state agency.	<ul style="list-style-type: none"> <li>Prior to negotiating for procurement, a notice to bidders shall be first published in the <u>Kansas Register</u>. Upon receipt of proposals, the PNC may negotiate with one or more of the firms submitting bids and select the bid of the party to contract with for services or technical products.</li> </ul>	The Director of Purchases shall submit a report at least once in each calendar quarter to the Legislative Coordinating Council, the chairperson of the Senate Committee on Ways and Means, and the chairperson of the House Committee on Appropriations of all negotiated procurements. In the event the PNC selects a bid which is not the lowest bid on a given contract, the report shall contain a rationale explaining why the lowest bidder was not awarded the contract.

I-1: STATUTORY REQUIREMENTS BY PROCUREMENT CATEGORY (CONTINUED)			
KANSAS STATUTE	PROCUREMENT CATEGORY	REQUIRED NOTICE	REQUIRED REPORT
75-37,132	<b>Contracts for professional or consultant services.</b> The Director of Purchases may delegate authority to the state agency to enter into the contract under conditions and procedures prescribed by the Director of Purchases.	<ul style="list-style-type: none"> <li>Contracts for professional or consultant services not anticipated to exceed \$25,000 in any fiscal year, shall be entered into by the state agency on the basis of <u>competitive negotiations with at least 2 individuals or firms unless the head of the state agency determines that competitive negotiations are not in the best interest of the state.</u></li> </ul>	<p>The agency head shall make a report to the Director of Purchases at least once in each calendar quarter during the term of each contract for professional or consultant services that exceeds \$5,000 that is entered into without competitive negotiations.</p> <p>The Director of Purchases shall prepare a detailed report at least once in each calendar quarter during the term of each contract for professional or consultant services that exceeds \$5,000 that is entered into under subsection (b) and all contracts for professional or consultant services reported to the Director of Purchases under subsection (c) and submit the report to the Legislative Coordinating Council, the chairperson of the Senate Committee on Ways and Means, and the chairperson of the House Committee on Appropriations and the chairperson of the Kansas Performance Review Board.</p>
<b>Non-Competitive Procurements</b>			
75-3739(a)	<b>Contracts over \$5,000 entered into without competitive bids</b> under the following conditions: (1) in the judgment of the Director of Purchases, no competition exists; (2) in the judgment of the Director of Purchases, these are best purchased without competition, or where rates are fixed by law or ordinance; (3) in the judgment of the Director of Purchases, an agency emergency requires immediate delivery or performance; (4) any statute authorizes another procedure or provides an exemption from the provisions of this section; (5) when compatibility with existing contractual services, supplies, materials or equipment is the overriding consideration; (6) when a used item becomes available and is subject for immediate sale; or (7) in the judgment of the Director of Purchases AND the head of the acquiring state agency, not seeking competitive bids is in the best interest of the state.	<p>For (1), (2), (5) and (7): The Director of Purchases shall post an <u>online notice</u> of purchases or contracts entered into without a competitive bid for an amount in excess of \$100,000 at least 7 days before the purchase or contract is awarded.</p> <p>The Director of Purchases shall provide notice to the legislature at the beginning of each calendar year that such information will be posted, the uniform resource locator (URL) and the number of times such information shall be available.</p> <p>In the event of a written protest within the 7-day period, the Director of Purchases shall request the contact information of the entity interested in supplying the goods or services and verify that the entity is interested and capable of supplying such goods or services. If the Director of Purchases is satisfied the protest is valid and competition exists, competitive procurement shall proceed.</p>	For (1), (2), (3), (5), (6) and (7): The Director of Purchases shall prepare a detailed report at least once per calendar quarter of these contracts and submit the report to the Legislative Coordinating Council, the chairperson of the Senate Committee on Ways and Means, and the chairperson of the House Committee on Appropriations.
75-3739(h),(i),(j),(k)	<b>Contracts over \$5,000 for services, supplies, materials or equipment</b> entered into through (a) interagency agreements with other governmental entities (federal, state and local governments) and private nonprofit educational institutions, (b) cooperative purchasing agreements or consortia for purchases with federal, state and local governmental entities; or (c) fully or partially funded grants from federal or private funds or a combination of these sources to a state agency.		The Director of Purchases shall prepare a detailed report at least once in each calendar quarter of these contracts and submit the report to the Legislative Coordinating Council, the chairperson of the Senate Committee on Ways and Means, and the chairperson of the House Committee on Appropriations.
Source: Kansas Statutes.			

## ***General Rule, Exemptions***

In general, state procurement laws require that all purchases of and all contracts for supplies, materials, equipment and contractual services to be acquired for state agencies shall be based on competitively negotiated procurements. However, there are several exemptions to this rule as defined in K.S.A. 75-3739(a), which are as follows:

- When, in the judgment of the Department of Administration (DoA) Director of Purchases, no competition exists.
- When, in the judgment of the DoA Director of Purchases, these are best purchased without competition, or where rates are fixed by law or ordinance.
- When, in the judgment of the Director of Purchases, an agency emergency requires immediate delivery or performance.
- When any statute authorizes another procedure or provides an exemption from the provisions of this section.
- When compatibility with existing contractual services is the overriding consideration.
- When a used item becomes available and is subject for immediate sale, or
- When, in the judgment of the DoA Director of Purchases AND the head of the acquiring state agency, not seeking competitive bids is in the best interest of the state.

## ***Controls within State Contracting Laws***

State contracting laws give the DoA Director of Purchases broad powers in approving or authorizing purchases and contracts. As mentioned above, these powers include exempting contracts from competitive bidding, if for example, in his judgment, no competition exists. However, state contracting laws also include more specific requirements, such as:

- The Director of Purchases shall require all bidders on state contracts to disclose all substantial interests held by the bidder in the state.
- Any and all bids may be rejected and a bid shall be rejected if it contains any material alteration or erasure made after the bid is opened.
- The Director of Purchases may reject the bid of any bidder who is in arrears on taxes due the state, who is not properly registered to collect and remit taxes due the state or who has failed to perform satisfactorily on a previous contract with the state.
- All contracts and purchases shall be awarded to the lowest responsible bidder, taking into consideration conformity with the specifications, terms of delivery, and other conditions imposed in the call for bids.



- Contracts and purchases shall be based on specifications approved by the Director of Purchases<sup>6</sup> and when deemed applicable and feasible by the Director of Purchases shall include energy efficiency standards or appropriate life cycle cost formulas or both.
- All bids with the names of the bidders and the amounts thereof, together with all documents pertaining to the award of a contract shall be made a part of a file or record and retained by the Director of Purchases for five years unless reproduced as provided in K.S.A. 75-3737 and amendments thereto, and shall be open to public inspection at all reasonable times.

Nonetheless, it would appear that whether KHPA followed state contracting requirements is ultimately based upon whether the contract was approved by the DoA Director of Purchases. Any contract KHPA enters into through a competitively negotiated procurement must follow DoA Division of Purchases' procedures for competitive negotiated procurements. If KHPA opts for non-competitive procurements of more than \$5,000 for emergency purchases, off-contract purchases, sole source, interagency purchases, professional services contracts and state use catalog waiver contracts, KHPA must request prior authorization approval by the Director of Purchases.

All three competitively negotiated contracts in our sample were facilitated by the DoA Division of Purchases and followed requirements under the procurement negotiating statute.<sup>7</sup> All were published in the Kansas Register to solicit bids, assigned a procurement negotiating committee (PNC), and approved by the DoA Director of Purchases. These three competitively negotiated procurements were for the Medicaid/SCHIP eligibility clearinghouse,<sup>8</sup> managed care behavioral and mental health services,<sup>9</sup> and provider utilization reviews of hospital admissions.<sup>10</sup>

The remaining seven contracts in our sample were Division of Purchases prior authorized sole source contracts totaling almost \$6 million. Four were contracts funded through federal grants or certified match funds totaling almost \$5.8 million. The other three were professional services contracts with former KHPA employees.

### ***Professional Services Sunshine Act***

The Legislature passed and the Governor signed the Professional Services Sunshine Act<sup>11</sup> which became effective July 1, 2000, and includes all contracts that commence on or after that date. As used in the Act, professional services means services performed under a contract with a state agency by any Certified

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<sup>6</sup> Subject to K.S.A. 75-3739(e)

<sup>7</sup> K.S.A. 75-37,102

<sup>8</sup> Total contract cost of \$56.8 million.

<sup>9</sup> FY 2009 capitation payments of \$4.8 million

<sup>10</sup> Total contract cost of \$5.1 million.

<sup>11</sup> This Act shall not apply to contracts for legal services performed under Article 36 of Chapter 40 of the Kansas Statutes Annotated upon written certification from the Commissioner of Insurance to the Director of Purchases and the Legislative Budget Committee that an emergency exists and the best interests of the state would be jeopardized by compliance with this Act.

Public Accountant, Attorney, or Consultant,<sup>12</sup> but does not include the services of persons who assist in the preparation of expert testimony for litigation or who act as expert witnesses in litigation.

All contracts for professional and consultant services that exceed \$25,000 shall be bid (negotiated) by the Division of Purchases in accordance with the provisions of the procurement negotiating statute,<sup>13</sup> with the following exceptions:

- When the Director of Purchases determines the services to be exempt from bidding pursuant to K.S.A. 75-3739 (a) or (h) and amendments (see section on exemptions on page 16).
- When the contract for services is not anticipated to exceed \$25,000 in any fiscal year.

If the contract is for services not anticipated to exceed \$25,000 in any fiscal year, KHPA shall enter into the contract on the basis of its own competitive negotiations with at least two individuals or firms unless the KHPA Executive Director determines that competitive negotiations are not in the best interest of the State.

The Division of Purchases defines competitive negotiations for the agencies as a method for contracting for services, whereby proposals are solicited by telephone or in writing from at least two qualified professionals, following submission of which changes in proposals and prices are allowed, and the offer deemed to be most advantageous in terms of criteria as designated in the proposal is accepted.

If exemptions under K.S.A. 75-3739(a) did not take precedence over the Professional Services Sunshine Act, the Division of Purchases would have been required to bid or negotiate one professional services contract in our sample awarded to a former employee in excess of \$100,000.<sup>14</sup> In this particular case, the Division of Purchases only posted a notice of the sole source contract on its website for possible protest by other interested vendors.

### ***Federal Grants and Certified Match Contracts***

State contracting laws specify that “federal grant money is not to be handled differently from state money unless the requirements of the applicable federal grant specifically require such federal money to be handled differently.”

Four contracts in our sample totaling almost \$5.8 million were funded by federal grants or certified match funds and are non-competitive bids allowed under K.S.A. 75-3739(h), (i) and (j). These non-competitive categories are interagency agreements with other governmental entities (federal, state and local governments) and private nonprofit educational institutions; cooperative purchasing agreements or consortia for purchases with federal, state and local governmental entities; and, fully or partially funded

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<sup>12</sup> Consultant means an individual or firm providing contractual services in the form of professional or technical advice or opinions.

<sup>13</sup> K.S.A. 75-37,102.

<sup>14</sup> Based on the procurement negotiating statute (K.S.A. 75-37,102)

grants from federal or private funds or a combination of these sources to a state agency. A short description of these contracts follows:

- *Contract with a local vendor for less than \$100,000.* This contract is funded through a Medicaid Infrastructure Grant (MIG) and is not required to be published in the Kansas Register. This contract was sole sourced because the vendor was deemed the only entity with comprehensive employment resources, experience and expertise in North Central Kansas in providing services to increase the self-sufficiency of people with disabilities.
- *Contract with the only CMS approved vendor.* This contract is funded through a Demonstration to Maintain Independence and Employment (DMIE) grant to provide a national and state media campaign to promote hiring of individuals with disabilities and could be awarded only to a CMS approved vendor.
- *Contract with a county public health department.* This is a certified match grant for prevention and early intervention services to new parents with emphasis on adolescent and pregnant teen parents of at-risk infants. The match is provided by the county health department.
- *Contract with a Kansas regents university research center.* This contract is funded through a Medicaid Transformation Grant for assisting in selecting screening and monitoring criteria to improve preventive health care services and the monitoring of chronic conditions.

### ***Compliance with Applicable Federal Requirements***

Failure to comply with any applicable federal requirements could result in disapproval or suspension of project funding. Thus, we requested regional Centers for Medicare and Medicaid Services (CMS) staff to verify that the 10 contracts in our sample followed applicable federal requirements, since these contracts were all fully or partially funded with federal funds.

According to CMS staff, only one of the 10 contracts in our sample required CMS approval. CMS review and approval is required for managed care mental health services contracts with SCHIP funding if the contract was entered into or renewed after July 1, 2009. According to CMS staff, they did not receive a copy of KHPA's managed care mental health services RFP documents when renewed after July 1, 2009.

According to the KHPA senior program manager overseeing the managed care mental health services contract, while he was not aware of the new requirement, he already requested a waiver of requirements from CMS in November 2009 due to a contract amendment to reduce contract costs by 10 percent effective January 1, 2010. He said he received a verbal approval from the CMS central office the last week of March but has yet to receive an official written approval. The KHPA senior program manager also said program managers periodically receive CMS directive letters which provide information on changes relevant to their program areas. However, it is up to program staff to review those directives and identify which contracts would be affected, which could be a challenge.

CMS staff also told us they would have reviewed one other contract in our sample related to the Medicaid Management Information System had it met the applicable minimum threshold amount under 45 CFR 95.611, as follows:

- *General Acquisition Requirements.*<sup>15</sup> A state shall obtain prior written approval from the U.S. Health and Human Services (HHS), when the state plans to acquire Automatic Data Processing (ADP) equipment or services (a) with proposed federal financial participation (FFP) at the regular matching rate that it anticipates will have total acquisition costs of \$5 million or more in federal and state funds;<sup>16</sup> (b) with proposed FFP at the enhanced matching rate, regardless of the acquisition cost;<sup>17</sup> (c) sole source acquisition or noncompetitive acquisition from a nongovernmental source with proposed FFP at the regular matching rate, that has a total state and federal acquisition cost of more than \$1 million but no more than \$5 million; and, states shall submit requests for approval which involve solely Title XIX funding (Medicaid) to CMS for action.
- *Specific Prior Approval Requirements.*<sup>18</sup> The state agency shall obtain written approval prior to the initiation of project activity for regular FFP requests by submitting (a) RFP and contract documents, unless specifically exempted by HHS, prior to release of the RFP or prior to the execution of the contract when the contract is anticipated to or will exceed \$5 million for competitive procurement and \$1 million for noncompetitive acquisitions from nongovernmental sources;<sup>19</sup> and (b) contract amendments, unless specifically exempted by HHS, prior to execution of the contract amendment involving contract cost increases exceeding \$1 million or contract time extensions of more than 120 days.<sup>20</sup> For enhanced FFP requests, KHPA should submit (a) RFP and contract documents, unless specifically exempted by HHS, prior to release of the RFP or prior to execution of the contract when the contract is anticipated to or will exceed \$100,000; and (b) contract amendments, unless specifically exempted by HHS, prior to execution of the contract amendment, involving contract cost increases exceeding \$100,000 or contract time extensions of more than 60 days.

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<sup>15</sup> 45 CFR 95.611(a)

<sup>16</sup> Subject to 45 CFR 95.611(b).

<sup>17</sup> See Footnote 11 above.

<sup>18</sup> 45 CFR 95.611(b)

<sup>19</sup> States will be required to submit RFPs and contracts under these threshold amounts on an exception basis or if the procurement strategy is not adequately described and justified in an Advance Planning Document (APD).

<sup>20</sup> States will be required to submit contract amendments under these threshold amounts on an exception basis or if the contract amendment is not adequately described and justified in an APD.

## **Conclusion and Recommendations**

**Conclusion:** KHPA appears to comply with the state's broad contracting laws. All contracts we reviewed were approved by the Director of Purchases. However, because state contracting laws are broad and do not directly address state agencies' responsibilities, KHPA could strengthen its own contracting procedures to ensure all contracts are, in fact and in appearance, awarded appropriately.

### **Recommendation:**

1. KHPA management should ensure CMS directives and other relevant federal notices of changes in federally funded programs are adequately reviewed and appropriate staff informed so requirements are complied with and the risk of federal funding being suspended or recouped is minimized.



## Does KHPA's Contracting Process Compare Favorably with Best Practices or Can Improvements Be Achieved?

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### Best Practices Guidelines and KHPA's Practices

To evaluate KHPA's contracting practices, we compared them with selected guidelines provided by the National Association of State Procurement Officials (NASPO) and the Federal Acquisition Regulations (FAR). NASPO is a non-profit association dedicated to strengthening the procurement community through education, research, and communication. It is made up of the directors of the central purchasing offices in each of the 50 states, the District of Columbia and the territories of the United States. Some of the selected guidelines we used in this audit came from the NASPO publication, *State & Local Government Procurement, a Practical Guide*. The FAR, under Title 48 of the Federal Code of Regulations,<sup>21</sup> is the principal regulation used by all federal executive agencies in their acquisition of supplies and services.

NASPO's *State & Local Government Procurement, a Practical Guide* emphasizes the importance of competition in government procurement. In a competitive market, the government purchaser attains the highest quality commodities and services at the lowest possible cost. The ultimate justification for the existence of all competition laws is to protect the government as consumer. Other benefits from the competitive marketplace include promoting better market performance and encouraging new technology and higher productivity.

According to NASPO, promoting competition at each stage of the procurement process includes following best practices such as the following:

- Make the decision to initiate the competitive process instead of relying on sole source procurement.
- Staff the process with truly independent procurement professionals.
- Do market research to create and expand lists of possible vendors.
- Draft specifications independently of any prospective vendor.
- Publicly announce invitations for bid or requests for proposals using the form of publication likely to reach the broadest possible number of potential vendors.
- Publicly announce the award of contracts.
- Avoid conflicts of interest.
- Document each stage of the process in a single procurement file or series of files.

To answer the audit question posed in this section of the report, we conducted a file review of a sample of 10 contracts to compare the existing contracting practices of KHPA with the concepts and practices

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<sup>21</sup> The FAR are issued within applicable laws under the broad policy guidelines of the Administrator, Office of Federal Procurement Policy, Office of Management and Budget.

suggested by NASPO and the FAR. Table II-1 lists the contracts we reviewed. The results of this comparison are discussed in the sections that follow.

II-1: SAMPLE CONTRACTS						
CONTRACT #	CONTRACT TYPE	CONTRACT AMOUNT	CONTRACTOR NAME	SERVICES OFFERED	CONTRACT START DATE	CONTRACT END DATE
<b>RFP 11821</b>	Competitively Negotiated Procurement	\$56,819,743	Policy Studies, Inc.	<b>Medicaid Clearinghouse:</b> Eligibility determination support services for AFDC-related Medicaid programs.	6/1/2009	6/30/2012
<b>KHPA2010-004</b>	Sole Source	\$5,125,000	Health and Disability Advocates	<b>National Media Campaign:</b> Promote public/private partnerships for increased coordination between employment services, job seekers, and business, promising employment practices.	8/1/2009	9/30/2010
<b>10084</b>	Competitively Negotiated Procurement	\$5,074,792	Kansas Foundation for Medical Care	<b>Utilization Review:</b> Provide services to safeguard against unnecessary or inappropriate use of Medicaid services and against excess payments.	7/1/2007	6/30/2012
<b>KHPA2007-038</b>	Interagency	\$303,784	University of Kansas Center for Research, Inc	<b>Quality Improvement:</b> Assist with selection of appropriate screening and monitoring criteria to improve quality preventive healthcare services and monitoring for chronic conditions.	3/1/2007	10/31/2009
<b>DHPF2006-031</b>	Interagency	\$264,000	Wyandotte County Board of Commissioners Public Health Department	<b>Healthy Families:</b> Provide prevention and early intervention services to new parents with emphasis on adolescent and pregnant teen parents of at-risk infants.	7/1/2009	6/30/2010
<b>KHPA2008-040</b>	Sole Source	\$114,750	Former Employee	<b>Medical Consultation Services:</b> Examination of medical records, determine prior authorizations, testify in administrative hearings, attend meetings including DUR, PERC and Hospice Task Force.	4/1/2008	6/30/2010
<b>KHPA2009-030</b>	Sole source	\$72,728	OCCK, Inc	<b>People with Disabilities:</b> Help KHPA develop infrastructure needed to expand services relating to self sufficiency of people with disabilities.	11/1/2008	10/31/2009
<b>KHPA2009-032</b>	Sole Source	\$25,000	Former Employee	<b>Professional Technical Services:</b> Testing activities, review and analyze system requirements and design specifications, develop test criteria and analyze business processes in MMIS.	12/15/2008	6/30/2010 <sup>(a)</sup>
<b>KHPA2007-032</b>	Sole Source	\$20,000	Former Employee	<b>Consultation Services:</b> Review of Medicaid institutional reimbursement changes, development of databases, economic analysis.	4/1/2007	6/30/2009
<b>DHPF2006-09072</b>	Competitively Negotiated Procurement	\$8.28 per member per month	Cenpatco Behavioral Health, LLC	<b>Mental and Behavioral Health:</b> Provide capitated managed care mental/behavioral health services.	5/1/2006	6/30/2010
<sup>(a)</sup> Extended from original end date of 6/30/2009. Source: OIG analysis of contract documents						

### *Promoting Full and Open Competition*

Federal Acquisition Regulation Section 6.101 requires, with certain exceptions, that contracting officers shall promote and provide for full and open competition in soliciting offers and awarding government contracts through use of competitive procedure(s).<sup>22</sup> Similarly, NASPO guidelines state that because government commodity and services purchases are direct costs to the taxpayer, procurement officers have an obligation to obtain the best possible quality and price obtainable in a competitive market. Competitive procedures available for use in fulfilling this requirement are sealed bids and other methods that promote competitive bidding. This can be accomplished by advertising Request for Proposals (RFPs), Invitation for Bids (IFBs) and Request for Quotations (RFQs), on accessible notice forums. Full and open

<sup>22</sup> This is a requirement under federal statutes 10 U.S.C. 2304 and 41 U.S.C. 253.



competition creates an environment that promotes the full effects of market forces thereby helping prices to decrease and quality to increase.

The OIG observed that KHPA upheld and advanced the principle of full and open competition in 15 contracts, representing roughly a quarter of the open contracts and over 94 percent of amounts awarded in FY 2010. These contracts were awarded through competitively negotiated procurements by requests for proposal.<sup>23</sup> The agency posted public notices soliciting bids either on the Division of Purchases website or in the Kansas Register. Contract managers keep the records of all notices of current contracts posted in the Kansas Register.

The interagency agreements, comprising 25 of the 57 contracts, were largely funded by federal grants or by federal matching funds supplementing county government budgets. In these cases, KHPA is primarily acting as a steward for the federal funds. Since the contractors for these interagency agreements are usually uniquely positioned to provide the services needed, the OIG did not regard KHPA's decision to not seek competitive bidders as a departure from the principle of full and open competition.

The remaining 17 contracts in FY 2010, totaling \$6.7 million were awarded using sole source arrangements. One sole source contract, comprising \$5.2 million of the \$6.7 million awarded was for a vendor pre-determined by CMS. Program managers provided written justification for sole sourcing, as shown on the prior authorization forms and cited the absence of competing vendors in the market or the expertise of a chosen vendor as the primary reason for not using open competition.

### ***Discouraging the Use of Sole Source Contracting***

Federal Acquisition Regulation Sections 6.301, 6.302 and 6.303-1 provide guidelines that pertain to contracting without full and open competition. Contracting without providing for full and open competition after exclusion of sources is a violation of federal statute, unless permitted by one of the exceptions specified by the FAR, similar to Kansas' statutory language.

The NASPO guidelines also discourage sole sourcing. According to NASPO, contracts awarded through sole source must be supported by complete and written justifications and approvals including a description of efforts made to ensure that offers are solicited from as many potential sources as are practicable, and including whether a notice was or will be publicized. Reasons for failing to publicize a notice should be documented.

The contracting officer should make a determination that the anticipated cost to the government will be fair and reasonable. If only one response is received, the officer should include a statement of price reasonableness in the contract file. The contracting officer may base the statement on the following: market research; comparison of the proposed price with prices found reasonable on previous purchases;

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<sup>23</sup> Competitive contracts active in FY 2010 totaled about \$245 million, excluding the MCO contracts.

current price lists, catalogs, or advertisements;<sup>24</sup> a comparison with similar items in a related industry; the contracting officer's personal knowledge of the item being purchased; comparison to an independent Government estimate; or any other reasonable basis.<sup>25</sup> If market research was conducted, there must be a description of the research conducted.

In addition, NASPO recommends the agency in need of a good or service study the market and determine whether that good or service is in fact the only one available to it. NASPO further states contracting officials should leave a satisfactory audit trail demonstrating an appropriate analysis was conducted to substantiate that the price offered is reasonable.

As noted earlier in this report, of the active contracts in FY 2010, 17 were sole sourced which totaled about \$6.7 million. All of these contracts have a written justification for sole sourcing as evidenced on the prior authorization (PA) forms. The Director of Purchases is supposed to use the information on the PA form to make an informed decision about whether to grant or deny the sole source request. NASPO recommends the state chief procurement officer conduct an independent analysis of all user requests.

We verified that all seven prior authorized contracts in our audit sample have prior authorization documentation and that all were approved by the Director of Purchases. However, according to NASPO standards, the contracts were missing:

- Documentation of efforts to solicit multiple bids and
- Documentation of market research conducted or statement of price reasonableness.

We did not find evidence that KHPA provided the Director of Purchases with supporting documentation that vendors with comparable expertise did not exist. As an example, the prior authorization sole source justification relating to contract KHPA2007-032 states that "...other consultants have been considered but it has been determined that, with the Contractor's knowledge and expertise in the area, it is beneficial and cost effective to obtain the Contractor..." There is no documentation to identify other consultants that were considered or invited to bid, and no evidence of any market research conducted. In these cases, KHPA missed an opportunity to use competitive market forces to help ensure that high quality contractors were obtained at a favorable price.

KHPA managers expressed their agreement with the principle of seeking competitive bids and their intention to adhere to this principle in practice whenever possible. They noted instances where the decision to use sole sourcing was driven by practical considerations. These include contracts that are largely federally funded and for which a federal agency had already chosen the winning contractor, applications for federal grants that require KHPA to submit the selected vendor's name with the application, and cases where KHPA hired a contractor to perform time-sensitive project tasks. These are valid reasons for employing sole sourcing.

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<sup>24</sup> However, inclusion of a price in a price list, catalog, or advertisement does not, in and of itself, establish fairness and reasonableness of the price.

<sup>25</sup> For additional information, see FAR Section 13.106-3 on award and documentation.

To more fully comply with NASPO and FAR best practices, the OIG would suggest that KHPA provide a complete, written justification in all future contract documentation, including the particular reason(s) that the sole source option was chosen. In that way, KHPA senior management and the Division of Purchases will foster transparency in contract decision making.

### ***Avoiding Potential Conflicts of Interest***

Federal Acquisition Regulation Section 3.101-1 requires that "...government business shall be conducted in a manner above reproach and...with complete impartiality." The general rule is to strictly avoid any conflict of interest or even the appearance of a conflict of interest in government-contractor relationships. Public contracting officials must determine the existence of any conflict of interest either on the part of agency representatives or potential contractor officials. This determination is accomplished by voluntary disclosures on conflict of interest forms or by examination of relationships that are known as a matter of public knowledge. The FAR stipulates that transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. Therefore, entities involved in the contracting process, whether individual or organizational, and whether representing the agency or the potential vendor, should avoid any conflict of interest or even the appearance of a conflict of interest.

Similarly, NASPO stresses the importance of avoidance of conflict of interest by emphasizing the need for independence of a public procurement official from vendors, bidders, prospective bidders, and interested parties. According to the FAR, if a particular acquisition involves a significant potential conflict of interest, the contracting officer shall submit to the relevant official a written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict. This recommendation should be made and its effectiveness analyzed before awarding the contract. The contract award in such circumstances should only be made if the need for the agency acquiring the goods or services outweighs the potential consequences that might result from the conflict.

KHPA has included conflict of interest clauses in some of its contracts. In others, separate conflict of interest declaration forms have been used. KHPA's conflict of interest clauses we found state that:

- "The Contractor shall not knowingly employ, during the period of this contract or any extensions to it, any professional personnel who are also in the employ of the State and who are providing services involving this contract or services similar in nature to the scope of this contract to the State. Furthermore, the Contractor shall not knowingly employ, during the period of this contract or any extensions to it, any state employee who has participated in the making of this contract until at least two years after his/her termination of employment with the State."
- "The vendor presently has no interest, direct or indirect, which would conflict with the performance of services under this contract and shall not employ, in the performance of this contract, any person having a conflict."

While KHPA requires a conflict of interest declaration from its contractors, we found this practice was not consistently applied. Three of the contracts we examined did not meet the conflict of interest disclosure requirement. We found contracts that have neither the conflict clause within the contract document nor the separate conflict of interest disclosure form. One such contract is KHPA2008-040, a consultant contract for services including determination of prior authorization and medical necessity by a contractor who also provides services to Medicaid consumers. We saw no documentation of any determination of conflict of interest by KHPA and no declaration of conflict of interest by the contractor.

In the case of KHPA2008-040, the contractor could find himself in a position of determining prior authorization for his own patients, although program managers said this never happened in the two years this contract has been in force. One mitigating factor is that the contractor is required to follow Medicaid rules as does any other Medicaid provider. If any of his claims go through the prior authorization process, the claims will undergo three different levels of review:

- The fiscal agent prior authorization staff
- A KHPA program manager
- The Medical Work Group, which consists of KHPA's Medical Director, other program managers, and this particular contractor.

In cases where the Medical Work Group's review is required and this contractor's claims are involved, we were told the contractor will not be allowed to participate in the decision-making. According to KHPA's Medical Director, the contractor never made any prior authorization reviews on his own patients and all reviews he made were based on predetermined criteria.

In addition, none of the employees who evaluated the bids for the eligibility clearinghouse and the managed care mental health services contracts disclosed any conflict of interest or signed a statement of independence relative to the vendors who submitted bids. If any of the evaluators had an interest in one of the competing bidders, there would have been a potential for biased results of which KHPA would not have been aware. Eleven agency employees participated in the evaluation of proposals for the eligibility clearinghouse contract and nine in the evaluation of proposals for the mental and behavioral health services managed care contract.

### ***Contracting with Current or Former Employees***

Federal Acquisition Regulation Section 3.601 states that whether competitively bid or otherwise, contracts should not be awarded to agency employees or to a business concern or other organization owned or substantially owned or controlled by one or more agency employees.<sup>26</sup> This regulation is intended to avoid any conflict, or perception of conflict, that might arise between the employees' interests and their government duties. Since an employee could exert influence on those who make final decisions

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<sup>26</sup> Agency employees serving on advisory committees are not considered 'agency employees' for purposes of this policy.

to award contracts or may influence contract terms, this regulation is also intended to avoid favoritism or unfair advantage, or the appearance thereof, on the part of the employee.

Similarly, three Kansas statutes address potential conflicts of interest arising from state agencies contracting with their employees. These statutes are as follows:

- *K.S.A. 46-286.* “Participation by state officer or employee in...any contract with any organization with which such person holds a position is prohibited.”
- *K.S.A. 46-233(a).* “(1) No state officer or employee shall in the capacity as such officer or employee be substantially involved in the preparation of or participate in the making of a contract with any person or business by which such officer or employee is employed or in whose business such officer or employee or any member of such officer's or employee's immediate family has a substantial interest and no such person or business shall enter into any contract where any state officer or employee, acting in such capacity, is a signatory to, has been substantially involved in the preparation of or is a participant in the making of such contract and is employed by such person or business or such officer or employee or any member of such officer's or employee's immediate family has a substantial interest in such person or business.”

“(2) Except as otherwise provided in this subsection, whenever any individual has participated as a state officer or employee in the making of any contract with any person or business, such individual shall not accept employment with such person or business as an employee, independent contractor or subcontractor until two years after performance of the contract is completed or until two years after the individual terminates employment as a state officer or employee, whichever is sooner. This prohibition on accepting employment shall not apply in any case where a state officer or employee who participated in making a contract while employed by the state of Kansas is laid off or scheduled to be laid off from any state position on or after July 1, 2002.”

- *K.S.A. 46-235.* “No state officer or employee shall accept compensation for performance of official duties, other than that to which such person is entitled for such performance. No person shall pay or offer to pay any state officer or employee any compensation for performance of official duties, except a state officer or employee performing official duties in making payments to state officers and employees. The receipt of wages or salary from an individual's non-state employer during a period of service as a state officer or employee shall not be construed as compensation for performance of official duties.”

KHPA has contracted with its employees for technical or consultative services. As shown on Table II-2, we reviewed three of these contracts, including the dates these individuals ended their employment with KHPA and the dates their contracts with KHPA became effective. Our review showed KHPA2007-032 was fully executed 10 days before the employee's last day of employment with the agency and became effective 21 days after his employee status ended. The contractor for KHPA2008-040 remained employed

by KHPA three months after the contract became effective. KHPA2009-032 became effective two months after the individual's employee status ended. In these three contracts, the job functions were the same or related to the functions they performed as KHPA employees.

<b>II-2: CONTRACTS WITH FORMER EMPLOYEES</b>			
<b>CONTRACT NUMBER</b>	<b>EMPLOYMENT END DATE</b>	<b>CONTRACT START DATE</b>	<b>CONTRACT AMOUNT <sup>(a)</sup></b>
KHPA2007-032	March 10, 2007	April 1, 2007	\$20,000 plus \$15,000 15-month extension
KHPA2008-040	June 28, 2008	April 1, 2008	\$114,750
KHPA2009-032	October 10, 2008	December 15, 2008	\$25,000 plus \$5,000 one-year extension
<sup>(a)</sup> Maximum amounts that can be paid. Actual amounts paid may be much lower. Source: OIG analysis of contract documents			

From a practical standpoint, these appear to be instances where only the type of relationship changed between KHPA and an employee, from an employer-employee relationship to a contractual relationship, for the benefit of both parties. In each case, it would appear KHPA had the benefit of a proven individual with demonstrated knowledge and skill. The three former employees were hired based on the program managers' knowledge of their competence, familiarity and experience working with the particular KHPA processes for which they contracted. According to KHPA managers, they used their knowledge of the cost and value of the services to ensure the contract price was reasonable. Nonetheless, because other bidders were not sought or contacted, there could be an appearance of favoritism. The case profile on page 31 demonstrates this issue.

While the practice of contracting with former employees is acceptable, sole sourcing these contracts carries several risks, such as:

- Friendships and associations with current and former employees could influence decision makers to not adequately seek contractual terms such as payments and deliverables that are in the best interest of the State.
- Without seeking competitive bids, it is difficult or impossible to know with certainty whether other potential contractors could deliver the same level of service at a lower cost or a higher level of service at a comparable cost.
- The practice of awarding contracts to current or former employees could create the impression among vendors and the general public of unfairness or impropriety, even though such may not be the case.

To minimize these risks, KHPA should use competitive bidding or negotiated procurement whenever possible.

Nonetheless, according to the Kansas Governmental Ethics Commission, there is no prohibition concerning a state agency contracting with former employees.<sup>27</sup> The Kansas Governmental Ethics Commission said there is no violation of the statutory or ethical regulations if an employee does not receive double compensation for the same work. We examined employee records which confirmed no duplicate payments were made. See the case profile below for additional information on this case.

### **Professional Services Case Profile**

KHPA converted an employee's part-time employment into a sole source contract for physician consultant services. According to this contractor's supervisor, the annual contract amount of \$51,000 did not exceed this individual's salary when employed as a KHPA employee. This contract took effect three months before the individual's employment was terminated by KHPA. The sole source prior authorization request was prepared after the contract had already been executed and in force.

Based on documentation we reviewed, this consultant spends an average of 11 actual contact hours per month for services including an average of 10 medical reviews and attendance at various committee meetings. He was on call or made himself available for consultation an average of 137 hours per month from July 2008 to February 2010. He receives \$4,250 monthly. If his services were priced based only on actual contact hours, KHPA is paying him an average of \$389 per contact hour.

KHPA could have negotiated to pay this contractor based on actual contact hours of services rendered. Contract price could have been specified for each type of service. For example, since this contractor serves on more than one committee, a separate rate could have been charged, equal to the rate paid other committee members for each specific committee he attends. As shown in Table OV-4 on page 6, KHPA members of advisory committees receive \$50-\$100 per hour of meeting attendance, travel reimbursement and meals.

### ***Publishing a Contracting Policy and Procedure Manual***

The National Association of State Procurement Officials recommend that the central procurement office publish and maintain an internal procedure manual, a policy manual for agency personnel and a vendor manual.

The policy and procedure manual must be promoted and made accessible to all agency staff that is in contact with or otherwise benefit from the activities of the contracting unit. The manual serves as a comprehensive reference to the whole procurement process. The manual should include a statement to promote competition, fairness and integrity. This document is important in terms of improving consistency, establishing control and developing a training program for procurement and other personnel.

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<sup>27</sup> This is in response to our request for an opinion.

It should delineate the responsibilities both program managers and the contracting unit have in making sure that every step in the contracting process is executed. It must spell out actions and the chronological order of executing the actions. A well-written contract policy and procedure manual can be an effective way to mitigate the impact of human resources turnover, especially among experienced contracting and procurement professionals.

KHPA's contracting unit and the Division of Purchases do not have a comprehensive policy and procedure manual. The execution of the contract in the case profile illustrates the importance of contracting procedures. If there had been a policy and procedures manual, it is possible they may have followed the chronologically and appropriate order for executing actions.

### ***Contract Documentation***

Federal Acquisition Regulation 4.801 for government contract files states that the documentation in the files shall be sufficient to constitute a complete history of the transaction for the purpose of providing a complete background as a basis for informed decisions at each step in the acquisition process, supporting actions taken, and furnishing essential facts in the event of litigation, among other reasons. This regulation also states that files must be maintained at organizational levels that ensure effective documentation of contract actions, ready accessibility to principal users, minimal establishment of duplicate and working files, the safeguarding of classified documents, and conformance with agency regulations for file location and maintenance.

FAR 4.803 lists required contents of contract files, which include the following:

- Justifications and approvals, determinations and findings, and associated documents.
- Synopsis of proposed acquisition or a reference to the synopsis.
- The list of sources solicited, and a list of any firms or persons whose requests for copies of the solicitation were denied, together with the reasons for denial.
- Government estimate of contract price.
- A copy of each offer or quotation, the related abstract, and records of determinations concerning late offers or quotations.<sup>28</sup>
- Cost or pricing data and Certificates of Current Cost or Pricing Data or a required justification for waiver, or information other than cost or pricing data.
- Cost or price analysis.
- Record of negotiation.
- Justification for type of contract.
- Required approvals of award and evidence of legal review.

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<sup>28</sup> Unsuccessful offers or quotations may be maintained separately, if cross-referenced to the contract file. The only portions of the unsuccessful offer or quotation that need be retained are—completed solicitation sections A, B, and K; technical and management proposals; cost/price proposals; and, any other pages of the solicitation that the offeror or quoter has altered or annotated.



- Notice of award.
- Documents requesting and authorizing modification in the normal assignment of contract administration functions and responsibility.
- Approvals or disapprovals of requests for waivers or deviations from contract requirements.
- Contract completion documents.
- Cross-references to pertinent documents that are filed elsewhere.
- Any additional documents on which action was taken or that reflect actions by the contracting office pertinent to the contract.
- A current chronological list identifying the awarding and successor contracting officers, with inclusive dates of responsibility.

Based on our review of contract files, it would appear KHPA's contract folders lack some of the information listed above, such as cost or price analysis, documentation of management approval to move ahead with the contract, and agency evaluation of technical and cost proposals.

According to NASPO recommendations,<sup>29</sup> for purposes of transparency and fairness in the competitive bidding environment, procurement professionals must document the process, particularly the methodology, by which they rank bidders and choose the winner. A documented competitive process leaves a good audit trail of how the winning vendor was selected and, if done objectively, can benefit the agency by selecting a deserving contractor and can stand up to any scrutiny by losing bidders.

KHPA has 15 active contracts in FY 2010 awarded through the competitive bidding process for a total commitment amount of more than \$244 million, excluding MCO contracts. However, we did not find evidence of the evaluation process in all the contracts. We did find documentation of vendor rankings for the five vendors who responded to RFP 09072. There was an indication of who placed first, second, and so forth in both cost and technical evaluations but we could not find any evaluation sheet showing the criteria used to arrive at the rankings. When we asked KHPA contract and program managers about the evaluation sheets, we found there is a general understanding among them that in order to avoid evaluation sheets being used in a sub-judicial discovery process by a losing vendor, these evaluation sheets should be destroyed once the winning bidder is selected and the contract fully executed and in force.

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<sup>29</sup> NASPO's *State & Local Government Procurement, A Practical Guide*, pages 130-131

## **Conclusions and Recommendations**

**Conclusions:** KHPA appears to be exercising due diligence and has a number of effective controls in its contracting process. In addition, the contract process is supported by a dedicated team of contract professionals. However, we believe KHPA could improve controls while reducing risks in its contracting process by incorporating some of the best practices from the Federal Acquisition Regulations and NASPO. These practices are designed to provide further assurance that government organizations conduct contracting business in a fair, transparent manner and that a philosophy of seeking competition pervades. Our recommendations could help provide stakeholders assurance against any perception of conflicts of interest or favoritism when awarding contracts, especially those that are sole sourced.

### **Recommendations:**

2. KHPA should develop a comprehensive contracting policy and procedure manual which follows all relevant State purchasing laws and prescribed best practices promoting competition, fairness and integrity. The manual should be easy to understand and provide a good medium of knowledge transfer, thereby mitigating the impact of turnover of experienced contracting staff in the future. It should also provide sufficient detail of the agency's procurement process from start to finish and list the responsibilities of the different agency units involved in contracting, and incorporate policies related to recommendations three through nine below.
3. KHPA should require appropriate staff to prepare a statement of business needs for presentation to KHPA executive management prior to contract development and preparation. The business analysis statement should include objectives, the tentative timing of the potential project, and cost projections. Senior management should grant its approval before contract development work begins.
4. KHPA should require documentation of the market research conducted to illustrate the absence of alternative vendors whenever sole sourcing a contract. The market research should include a list of potential vendors who were contacted, as well as a description of efforts made to ensure that offers were solicited from as many potential sources as practicable, including whether a notice was or will be publicized. If only one response is received, the contracting officer's statement of price reasonableness should be included in the contract file with supporting documentation.
5. KHPA should require competitive bidding or negotiated procurement whenever possible, including for services that could be sole sourced to KHPA employees identified as potential contractors. This is to ensure the award is fair and appropriate both in appearance and in fact.
6. KHPA should require all employees substantially involved in preparing, developing or participating in the making of a contract or awarding of a contract, including each contract's evaluation team, to sign an independence statement or disclosure of conflict of interest statement

in accordance with K.S.A 46-286, K.S.A 46-233(a) and K.S.A 46-235. KHPA should also develop specific guidelines to follow in the event an actual conflict of interest occurs.

7. KHPA should identify a price or rate for each type of service where different services are bundled into one contract. For professional services, the unit of measure could be the number of hours services were actually rendered. If a contractor serves on a committee, they should be paid the hourly rate for meeting attendance separately from his professional contract.
8. KHPA should retain all documents, including any evaluation tools and criteria, for the purpose of providing a complete background of the acquisition process, supporting actions taken and the essential facts in the event of litigation. Contracts awarded through sole source should be supported by complete and written justifications and approvals.
9. KHPA Contract staff should consistently include a clause in KHPA contracts prohibiting vendors from having any conflict of interest.



## **Appendix A: Agency Response**

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May 28, 2010

Nick Kramer  
Inspector General  
Kansas Health Policy Authority  
109 S.W. 9th Street, 7<sup>th</sup> Floor  
Topeka, KS 66612-1280

Dear Mr. Kramer:

The Kansas Health Policy Authority (KHPA) has received the Office of the Inspector General's (OIG) report regarding its audit of KHPA's contracting practices and appreciates the opportunity to respond to the report. KHPA found the conclusions generated by the audit informative. We are pleased that the audit findings revealed no systemic problems warranting significant and immediate action; and that audit conclusion reveals that KHPA's contracting process conforms to state law and Division of Purchases policies.

**KHPA Comments on OIG Conclusions and Recommendations**

*1. Compliance with applicable federal requirement:*

**Conclusion:** *KHPA appears to comply with the state's broad contracting laws. All contracts we reviewed were approved by the Director of Purchases. However, because state contracting laws are broad and do not directly address state agencies' responsibilities, KHPA could strengthen its own contracting procedures to ensure all contracts are, in fact and in appearance, awarded appropriately.*

**Recommendation:**

1. KHPA management should ensure CMS directives and other relevant federal notices of changes in federally funded programs are adequately reviewed and appropriate staff informed so requirements are complied with and the risk of federal funding being suspended or recouped is minimized.

*KHPA's response:*

*KHPA agrees with the recommendation and believes that it already complies with the recommendation. KHPA legal staff, program managers and contract staff monitor CMS directives and other relevant federal notices of changes in federally funded programs and will continue to do so. KHPA senior management also reviews the periodic Medicaid Directors letters and other notifications from CMS as well as other trade organizations.*

*Legal staff, program managers and contract staff will continue to work together to ensure that KHPA complies with all requirements and continues to avoid suspension or recoupment of federal funding.*

*2. Best practices guidelines and KHPA's practices:*

**Conclusions:** *KHPA appears to be exercising due diligence and has a number of effective controls in its contracting process. In addition, the contract process is supported by a dedicated team of contract professionals. However, we believe KHPA could improve controls while reducing risks in its contracting process by incorporating some of the best practices from the Federal Acquisition Regulations and NASPO. These practices are designed to provide further assurance that government organizations conduct contracting business in a fair, transparent manner and that a philosophy of seeking competition pervades. Our recommendations could help provide stakeholders assurance against any perception of conflicts of interest or favoritism when awarding contracts, especially those that are sole sourced.*

**Recommendations:**

2. KHPA should develop a comprehensive contracting policy and procedure manual which follows all relevant State purchasing laws and prescribed best practices promoting competition, fairness and integrity. The manual should be easy to understand and provide a good medium of knowledge transfer, thereby mitigating the impact of turnover of experienced contracting staff in the future. It should also provide sufficient detail of the agency's procurement process from start to finish and list the responsibilities of the different agency units involved in contracting, and incorporate policies related to recommendations three through nine below.

*KHPA's response:*

*KHPA agrees with the recommendation. The Contract Development Manager will develop a policy and procedure manual addressing the procurement process for the various contracts (negotiated procurement, interagency agreements, sole source etc.). The manual will include the state laws, best practices and flow charting to provide a resource for the contract unit and agency for reference. The implementation of the new Statewide Management Accounting and Reporting Tool (SMART) and ImageNow may necessitate changes in the current process and will be incorporated into the manual as they are implemented. The policy will be completed by December 31, 2010.*

3. KHPA should require appropriate staff to prepare a statement of business needs for presentation to KHPA executive management prior to contract development and preparation. The business analysis statement should include objectives, the tentative timing of the potential project, and cost projections. Senior management should grant its approval before contract development work begins.

*KHPA's response:*

*KHPA agrees with this recommendation and already has a process in place. All contracts are presented at the Administrative Staff (Ad Staff) meeting held weekly. The meeting is the venue for presenting and discussing contracts and other outsourcing opportunities prior to starting the contracting/procurement process. The Ad Staff provides a forum for managers to present contract proposals for review by the senior management of the agency. The Director of Medicaid and Deputy Director of Medicaid*



*Operations co-chair the Ad Staff meeting and communicate to Executive Management the recommendation of the Ad Staff before proceeding with procurements. KHPA meets this requirement since senior (Executive) Management grants its approval before any major work begins on contract development and procurement.*

4. KHPA should require documentation of the market research conducted to illustrate the absence of alternative vendors, whenever sole sourcing a contract. The market research should include a list of potential vendors who were contacted, as well as a description of efforts made to ensure that offers were solicited from as many potential sources as practicable, including whether a notice was or will be publicized. If only one response is received, the contracting officer's statement of price reasonableness should be included in the contract file with supporting documentation.

*KHPA's response:*

*KHPA agrees with the principle of seeking competitive bids and fully intends to adhere to the principle whenever possible. KHPA disagrees with the OIG's classification of contract KHPA2010-004, with Health and Disability Associates to provide a national media campaign to promote public/private partnerships for increased coordination between employment services and job seekers primarily for Medicaid beneficiaries, as a sole source contract. The OIG does not recognize the unique position of this vendor. The vendor is the only CMS approved vendor for those services and all funding comes from Federal participation with no state match. The only choice left to the state is whether or not to participate in the media campaign, not whether or not to use the prescribed contractor. In addition, since the contract was competitively procured by CMS we believe that it clearly falls under the category of competitively acquired contracts. KHPA also believes that taking advantage of contract already competitively procured at the federal level is a cost effective and smart contracting method to secure services and be ensured that adequate research has been done regarding viable vendors.*

*KHPA agrees that documentation of the absence of alternative vendors when requesting sole sourcing contracts should be provided when requesting prior authorization approval. As verified by the audit, KHPA follows the prior authorization process established by the Department of Purchases, whenever sole sourcing a contract. The process requires that the agency justifies why it believes the contractor is the best suited to provide the services. The Director of purchases reviews and approves all requests. KHPA will continue to provide justification for its sole sourcing choices. KHPA will continue to scrutinize the sole source justifications to ensure they are complete, reasonable and comprehensive.*

5. KHPA should require competitive bidding or negotiated procurement whenever possible, including for services that could be sole sourced to KHPA employees identified as potential contractors. This is to ensure the award is perceived as fair and appropriate.

*KHPA's response:*

*KHPA agrees that competitive bidding or negotiated procurement is proper when the agency is wishing to obtain experienced and knowledgeable vendors. KHPA will continue to enter into consultant contracts to select the most viable candidate while considering the experience, cost and the*

*propriety of the selection and remaining in compliance with State regulations. The Agency will consider all applicants for open positions; however, if in the opinion of management the applicant who can best fill the position is a former employee, KHPA will continue to selectively and prudently enter into contracts with former employees.*

6. KHPA should require all employees substantially involved in preparing, developing or participating in the making of a contract or awarding of a contract, including each contract's evaluation team, to sign an independence statement or disclosure of conflict of interest statement in accordance with K.S.A 46-286, K.S.A 46-233(a) and K.S.A 46-235. KHPA should also develop specific guidelines to follow in the event an actual conflict of interest occurs.

*KHPA's response:*

*KHPA agrees with the recommendation and will develop a policy to require KHPA employees involved in the development of a contract to sign a disclosure statement indicating there is no conflict of interest at the initiation of contract procurement. If the employee becomes aware during negotiations there is a conflict of interest, the employee will notify the KHPA compliance officer. The compliance officer will determine the nature of the conflict of interest and determine whether the employee may continue with the development of the procurement or recuse themselves from the contract negotiation. Policy will be completed by December 31, 2010.*

7. KHPA should identify a price or rate for each type of service where different services are bundled into one contract. For professional services, the unit of measure could be the number of hours services were actually rendered. If a contractor serves on a committee, he should be paid the hourly rate for meeting attendance separately from his professional contract.

*KHPA's response:*

*In principle, KHPA agrees with the recommendation. However, certain vendors are contracted to provide on call professional consultant services as needed by KHPA. These consultant services can be for committee meetings of short duration, consultation with program managers or for administrative hearings lasting several hours. A consultant maintaining a business on a full time basis should not be expected to forgo income from a private practice without receiving adequate compensation to reschedule or reduce their office workload on short notice. KHPA has remained in compliance with State Regulations when employing former employees and does not see the compensation to be excessive in relation to the scope of work and requirements agreed to.*

8. KHPA should retain all documents, including any evaluation tools and criteria, for the purpose of providing a complete background of the acquisition process, supporting actions taken and the essential facts in the event of litigation. Contracts awarded through sole source should be supported by complete and written justifications and approvals.

*KHPA's response:*

*KHPA partially disagrees with the recommendation. KHPA believes it complies with the Kansas Open Records Act (KORA) and the allowed exceptions under the Act such as "Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda,*

*recommendations or other records in which opinions are expressed or policies or actions are proposed". This would cover all documents, financial records, notes and memoranda exchanged between staff when reviewing the vendor proposals. If KHPA could not offer some protection from disclosure to a vendor of their proprietary, confidential or business-sensitive information, KHPA runs the risk of either getting poor or no information during procurement. KHPA provides a written detailed and comprehensive summary of the bids 'evaluation and justification for its choice of contractor to the Director of Purchases. Taking advantage of the KORA's exception allows KHPA to encourage broader vendor participation and reduces the state's risk for litigation.*

*KHPA agrees with the rest of the recommendation and believes that it is already in compliance with the recommendation. As verified by the audit, KHPA follows the prior authorization process established by the Department of Purchases, whenever sole sourcing a contract. The process requires that the agency justifies why it believes the contractor is the best suited to provide the services and approval of each request by the Director of Purchases. KHPA will continue to provide documentation for its sole sourcing choices and will continue to scrutinize the justification documents to ensure they are complete, reasonable and comprehensive.*

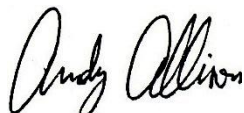
9. KHPA Contract staff should consistently include a clause in KHPA contracts prohibiting vendors from having any conflict of interest.

*KHPA's response:*

*KHPA agrees with the recommendation and a clause prohibiting vendors from having a conflict of interest will be present in all agreements between contractors and KHPA. Effective June 30, 2010 all agreements to be entered into, extended or renewed will have a conflict of interest agreement added as part of the extension or renewal policy if there is no clause in the current agreement.*

We appreciate the efforts of the OIG's staff in conducting the audit and being willing to discuss early drafts of the audit. They were responsive in responding to our comments. Thank you for the opportunity to respond to the draft audit report.

Sincerely,



Andrew Allison, PhD  
Executive Director

cc: Dr. Barbara Langner, Medicaid Director  
Christiane Swartz, Medicaid Deputy Director and Director of Operations  
Gary Combs, Sr Manager Contract Unit



## **Appendix B: Glossary and Acronyms**

ADP	Automatic Data Processing
AFDC	Aid to Families with Dependent Children
APD	Advance Planning Document
CFR	Code of Federal Regulations
CMS	Centers for Medicare and Medicaid Services
DMIE	Demonstration to Maintain Independence and Employment
DoA	Kansas Department of Administration
DUR	Drug Utilization Review Board
FAR	Federal Acquisition Regulations
FFP	Federal Financial Participation
FY	State Fiscal Year
HHS	U.S. Department of Health and Human Services
HIPAA	Health Insurance Portability and Accountability Act
IFB	Invitation for Bids
KDHE	Kansas Department of Health and Environment
KDOA	Kansas Department on Aging
KHPA	Kansas Health Policy Authority
K.S.A.	Kansas Statute Annotated
KU	University of Kansas
MCAC	Medical Care Advisory Committee
MCO	Managed Care Organization
MHPDAC	Mental Health Prescription Drug Advisory Committee
MMIS	Medicaid Management Information System
NASPO	National Association of State Procurement Officers
OIG	Office of Inspector General
PA	Prior Authorization
PDL	Preferred Drug List
PERC	Peer Educational Review Council
PNC	Procurement Negotiating Committee
RFP	Request for Proposal
RFQ	Request for Quotation
SCHIP	State Children's Health Insurance Program
SRS	Kansas Department of Social and Rehabilitation Services

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## **Appendix C: State Contracting Laws**

<b>75-3738</b>	Powers and Duties of the Director of Purchases
<b>75-3739</b>	Competitive bids, exceptions; bidding procedures; reports of purchases without bids, waivers of bid solicitation publication and delegations of purchasing authority; highway contracts exemption; state agency contracts exemption; prior approval of real property leases.
<b>75-3739a</b>	Reverse auctioning electronic procurement process
<b>75-3740</b>	Competitive bids; price preferences; building contracts; bid records
<b>75-3741c</b>	Same; exemption from local building codes, permits and fees and certain zoning fees; use of other political subdivision code review or inspection services
<b>75-3740a</b>	State and local government contracts; bidders domiciled in other states
<b>75-3740b</b>	Purchase of recycled paper; requirements; price preference
<b>75-3741</b>	Buildings, major repairs or improvements; competitive bids on all or separate portions of projects, procedures, determinations; subcontractors; prime contractors; award of contracts; standard contracts; rules and regulations; project supervision; change orders; collusive or combined bids
<b>75-3741a</b>	Same; change orders, negotiation or bidding.
<b>75-3741b</b>	Same; negotiation for projects of \$10,000 or less; reports
<b>76-769</b>	Pilot project, acquisition of goods and services for certain state educational institutions; duties and function of state board of regents and director of purchases; guidelines, exemptions and limitations; reports to legislature
<b>75-37, 102</b>	Procurement negotiating committees, services or technical products; composition; powers; notice and procedures; bidding and open meeting exemptions; reports to legislative coordination council and committees
<b>75-37, 103</b>	Debarment of state contractors
<b>75-37, 104</b>	Prequalification of state contractors
<b>75-6901</b>	Application of act; awarding authority defined
<b>75-6902</b>	Withdrawal and correction of bids; prior to bid opening
<b>75-6903</b>	Bids with judgmental mistakes, not withdrawable after bid opening
<b>75-6904</b>	Bids with nonjudgmental mistakes
<b>75-6905</b>	Same; notice of bid with nonjudgmental mistake; basis for withdrawal
<b>75-6906</b>	Same; bidder withdrawing bid not to perform work on project
<b>75-6907</b>	Actions to enjoin enforcement of contracts based on certain bids with mistakes; venue; relief
<b>75-6908</b>	Act inapplicable to Kansas turnpike authority
<b>75-5276</b>	Same; purchase of goods and services by public agencies, organizations and state employees; certain state agency purchases mandated
<b>75-5277</b>	Same; exceptions to mandatory purchase requirement
<b>75-3321</b>	Same; purchase of products or services by state or school district

<b>75-3322</b>	Same; waiver of mandatory purchase requirements by Director of Purchases
<b>75-1005</b>	Printing and binding by division of printing; by state institution or commercial printer
<b>75-6601</b>	State surplus property program; established; eligible participants; storage
<b>75-6602</b>	Procedures authorized for disposing of surplus property; rules and regulations
<b>75-6603</b>	Powers and duties of secretary of administration; rules and regulations
<b>75-6604</b>	Disposition of proceeds received for surplus property
<b>75-6605</b>	Assessments by Secretary of Administration, disposition; transfer of funds
<b>75-6606</b>	Disposition of personal property of state agencies; rules and regulations; transfer or loan of property to other state agencies, fees; trade-in with purchase, election by secretary of administration
<b>75-6608</b>	Department of Administration central planning agency for storage of state surplus property; annual survey; approval of acquisition of space for storage; state agency defined
<b>75-6401</b>	Kansas prompt payment act
<b>75-6402</b>	Definitions
<b>75-6403</b>	Prompt payment for goods and services required; interest payment penalty; rate; conditions and procedures
<b>75-6404</b>	Same; payments prior to final acceptance not prohibited
<b>75-6405</b>	Same; payment at discount rate; late penalty
<b>75-6407</b>	Rules and regulations
<b>75-37, 130</b>	Professional services sunshine act; citation
<b>75-37, 131</b>	Same; definitions
<b>75-37, 132</b>	Same; contract negotiations requirements; exceptions
<b>75-37, 133</b>	Same; expenditure of grant funds
<b>75-37, 134</b>	Same; use of federal funds
<b>75-37, 135</b>	Same; legal services; submission to legislative budget committee, when; contingency fees, factors to consider